88-641

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DIANELLA SHIPPING CORPORATION,
IN PERSONAM, and M/V RAJAAN,
Her Engines, Tackle, Apparel, Etc.,
IN REM,
Petitioners

v.

ALEJANDRO HERNANDEZ,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

KENNETH D. KUYKENDALL
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380
Attorney for Petitioners

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

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QUESTIONS PRESENTED

1.

Whether the decision of this Court in *Sure-Tan v. N.L.R.B.*, 467 U.S. 883, 104 S. Ct. 2803, 81 L.Ed.2d 732 (1984) that an illegal alien must establish his legal right to be present and employed in the United States as a prerequisite for the award of future United States wages is limited to labor cases under 29 U.S.C. § 158 or whether this principle is applicable to other causes of action pursued by an illegal alien under other federal statutes, including the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), to insure consistency in the application of the immigration laws of the United States.

2.

Whether the District Court should have referred this illegal alien to the Immigration and Naturalization Service for a determination of his right to remain in the United States legally because Congress has placed such determination within the primary jurisdiction of the executive branch of the government.

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the filing of the complete list of all parties to the proceedings below and, additionally, all parties and persons believed to be interested in the outcome of this Petition:

1. Alejandro Hernandez.
2. Dianella Shipping Corporation.
3. Ishikawajima Harima Heavy Industries, Ltd.
4. O.J.I. Seke-Kogyo Kabushinki Kaisha.
5. Cargill, Inc.
6. Brazos River Harbor Navigation District.
7. Affiliated Rice Mills.
8. Trans Ocean America, Inc.
9. Langston Companies, Inc.
10. Amoco Fabrics Company.
11. Patchogue Plymouth Division.
12. Euro Grain Trading, Ltd.
13. General Produce and Fibres, Ltd.
14. West Texas Rice Company.
15. Synthetic Industries Texas, Inc.
16. Texas Employers' Insurance Association.
17. The West of England Ship Owners Insurance Services Limited.
18. American International Underwriters.

KENNETH D. KUYKENDALL
Attorney for Petitioners,
M/V RAJAAN and Dianella
Shipping Corporation

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v.

ALEJANDRO HERNANDEZ,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 30, 1988, as modified by the per curiam opinion dated June 20, 1988.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court dated August 5, 1985, are unreported, but are attached hereto as Appendix "A". The original opinion of the Court of Appeals for the Fifth Circuit affirming in part, vacating in part, and remanding to the District Court is reported at 841 F.2d 582 (5th Cir. 1988), and it is attached as Appendix "B". The subsequent per curiam opinion of the Court of Appeals for the Fifth Circuit modifying the original opinion in response to the Petition for Rehearing is reported at 848 F.2d 498 (5th Cir. 1988), and it is attached as Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 30, 1988. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, and the subsequent opinion modifying the original opinion was entered on June 20, 1988. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, but it was denied on July 21, 1988. The Order denying said Petition is attached hereto as Appendix "D". A Protective Motion for Extension of Time to File Petition for Writ of Certiorari was filed, and it was granted on September 12, 1988. This Order granted Petitioner an extension of time for filing the Petition for Writ of Certiorari up to and including October 18, 1988. The District Court had jurisdiction pursuant to 28 U.S.C. § 1333. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The following United States Statutes are involved in this case:

The Longshore and Harbor Workers' Compensation Act, in pertinent part:

33 U.S.C.A. § 905(b) (West 1986)

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title. . . .

The Immigration and Naturalization Act, in pertinent part:

8 U.S.C.A. § 1105a (West Supp. 1988)

Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of Chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act . . . ;

8 U.S.C.A. § 1252(b) (West 1970 & Supp. 1988)

Apprehension and deportation of aliens

(b) Proceedings to determine deportability; removal expenses

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any

alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. . . .

> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. . . .

8 U.S.C.A. § 1324(a) (West Supp. 1988)

Bringing in and harboring certain aliens

(a) Criminal Penalties

(1) Any person who—

. . .

> (C) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; or
>
> (D) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law,

shall be fined in accordance with Title 18, imprisoned not more than five years, or both, for each alien in respect to whom any violation of this subsection occurs.

8 U.S.C.A. § 1361 (West Supp. 1988)

Burden of proof upon alien

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this chapter, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not subject to exclusion under any provision of this chapter. In any deportation proceeding under part V of this subchapter against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.

STATEMENT OF THE CASE

This is a cause of action for personal injuries sustained by longshoreman Alejandro Hernandez while working onboard the M/V RAJAAN on September 21, 1983, pursuant to § 905(b) of the Longshore & Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.* The District Court found vessel owner Dianella Shipping Corporation, (hereinafter "Dianella") negligent, and the District Court properly awarded damages for Hernandez' past medical expenses during Hernandez' rehabilitation in Houston ($153,472). Nevertheless, although Hernandez was an illegal alien without any basis for remaining in the United States, the District Court awarded Hernandez damages for future United States wages and medical expenses in the amount of $2,234,-221.00, and the District Court rejected Dianella's contention that Hernandez' award for such future damages should be based on Hernandez' wages and medical expenses in Mexico. The Court of Appeals required a remittitur on the award for United States future wage loss, but the Court of Appeals affirmed the award of future damages on the basis of Hernandez' anticipated wage loss and medical expenses in the United States rather than in Mexico. The difference between future medical expenses in the United States and Mexico is $1,219,-860.00.[1]

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1. The majority of such difference ($694,000) was the cost of attendant care for paying Hernandez' wife or a nurse's aide in the United States ($730,000) versus the cost of paying his wife or a nurse in Mexico ($36,000). The evidence clearly established that Hernandez' wife provided the attendant care, but the District Court and Court of Appeals found that she might not be able to continue providing care. Hernandez' wife and children always lived in Mexico while he worked in the United States, and his wife was only granted a visitor's visa by the Immigration Service in January, 1984, until

The validity of the Court of Appeals' decision to award future United States wages and medical expenses to an illegal alien depends upon the illegal alien's right to remain in the United States. The evidence established that Hernandez was an illegal alien, and he was not entitled to remain in the United States under the immigration laws. Hernandez initially entered the United States in 1970 as an illegal alien. He could not remember all the times he had been deported, but the evidence established that he had been apprehended and deported by the Immigration Service on at least three occasions from 1970 to September 21, 1983. (App. E, pp. 55a-57a) Also Hernandez had returned to Mexico on several occasions for visits; and his three daughters were born in Mexico in 1973, 1980, and 1981, after he commenced work in the United States. Hernandez admitted at trial that he had never tried to obtain legal entry into the United States.[2]

After Hernandez' injury and during his rehabilitation in the hospital in Houston, Hernandez requested assistance from his treating physician (Dr. Donovan) and the social worker (Pena) to write letters to the Immigration Service. These letters requested entry for his wife and three children in the United States until his rehabilitation

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Hernandez' rehabilitation was completed and he could return to Mexico. (App. E, pp. 58a-60a and App. F, pp. 62a-63a) Therefore, since Hernandez' wife could not remain in the United States after his rehabilitation, he might need a nurse's aide if he continued to remain in the United States illegally.

2. Q. Have you made any application with the immigration service to stay in the United States or taken any other action to try to stay in the United States?
   A. No. I haven't done anything until this time. I haven't applied for my permits.
   (App. E, p. 61a).

was complete and he was able to return to Mexico. His wife was allowed to enter the United States in 1984 on a visitor's visa, but the children were not permitted to enter the United States. (App. E, pp. 59a-60a, and App. F, pp. 62a-63a). In fact, the only evidence that Hernandez could remain in the United States after his rehabilitation was as follows:

> THE COURT: "Do you have an intention to return to Mexico or do you plan to remain in this country, if you can?"
>
> THE WITNESS: "If it is possible, I would like to stay here in the United States."

(App. E, p. 60a).

On the basis of Hernandez' intention to remain in the United States as an illegal alien without any legal basis to do so, the District Court awarded United States future wages and medical expenses on the assumption that Hernandez would continue to evade the immigration laws of the United States. In addition, the District Court refused Dianella's position that Hernandez should be referred to the Immigration Service for a determination of Hernandez' legal right to remain in the United States before the District Court could award U. S. future wages and medical expenses.

The Court of Appeals' initial decision recognized that the District Court merely assumed Hernandez would remain in the United States on the basis of "the finding that Hernandez intended to reside in the United States," and the opinion of the Court of Appeals dated March 30, 1988, rejected Dianella's argument that an illegal alien could not recover such damages unless he demonstrated his legal right to remain in the United States.

(App. B, pp. 32a-33a). Nevertheless, although this opinion recognized the validity of Dianella's position that future wages and medical expenses for an illegal alien should be calculated on the basis of Mexican wages and medical expenses in accordance with *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S. Ct. 2803, 81 L.Ed.2d 732 (1984) (herein *"Sure-Tan"*), the Court of Appeals held that the passage of the "Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101 *et seq.* (1987), has placed a belated stamp of legitimacy on the district court's assumption that Hernandez could remain in the United States." (App. B, p. 33a)

Dianella's Petition for Rehearing and Suggestion for Rehearing En Banc challenged the Court of Appeals' conclusion that the Immigration Reform and Control Act of 1986, hereinafter "1986 Act", validated the District Court's assumption regarding the award of future wages and medical expenses. Dianella argued that the 1986 Act was not in effect at the time of the injury or trial and that the provisions of the 1986 Act demonstrated Hernandez could not be admitted legally into the United States. Furthermore, Dianella argued that the Fifth Circuit's decision violated constitutional due process. Thereafter, the Fifth Circuit requested that Hernandez file a Response to the Petition for Rehearing; and such Response agreed that Hernandez' immigration status should be decided on the basis of the decision of the District Court and not the 1986 Act.

The Court of Appeals' per curiam opinion dated June 20, 1988, again affirmed the award of damages on the basis of United States future wages and medical expenses, but the Court of Appeals changed its legal analysis from its opinion dated March 30, 1988. The Court of Appeals'

per curiam opinion dated June 20, 1988, determined (1) that the principle in *Sure-Tan, supra,* was limited to labor cases and did not apply to an action under 33 U.S.C. § 905(b), and (2) that Dianella had the burden of proof to show "that Hernandez was about to be deported or would surely be deported" to sustain its position that future damages should be based on wages and medical expenses in Mexico.

REASONS FOR GRANTING WRIT

The opinion of the Court of Appeals should be reviewed because it is in direct conflict with the prior decision of this Court in *Sure-Tan, supra,* and the immigration laws of the United States. The Court of Appeals refused to apply the legal principle in *Sure-Tan* that an illegal alien cannot recover United States future damages until the illegal alien demonstrated his legal right to remain in the United States because this was a longshore case under 33 U.S.C. § 905(b), and not a labor case under 29 U.S.C. § 158, *et seq.* Nevertheless, the Court of Appeals failed to recognize the legal and policy basis of the *Sure-Tan* decision to insure consistency between the application of the immigration laws and the labor laws of the United States; and this same principle applies in insuring consistency in the application of other Federal statutes, including 33 U.S.C. § 905(b), with the immigration laws of the United States. Furthermore, the decision of the Court of Appeals to transfer the burden of proof to Petitioner to show "that Hernandez was about to be deported or would surely be deported" is an error of law; and such legal determination is inconsistent with the immigration laws and *Sure-Tan.*

The opinion of the Court of Appeals should be reviewed because such decision improperly authorized the Federal Court to determine an illegal alien's right to remain in the United States or be deported when such decision is in the exclusive province of the executive branch of the government. The District Court should have granted Petitioner's motion and referred the illegal alien to the Immigration Service if the District Court found that Hernandez intended to remain in the United States illegally after his rehabilitation. By this decision, the District Court and the Court of Appeals have approved the violation of the immigration laws by rewarding such illegal alien for his illegal activity. Furthermore, the decision of the Court of Appeals in refusing to refer the illegal alien to the immigration service for a determination of his legal status permits encroachment by the judiciary in an area committed to executive discretion. Hence, the decision of the Court of Appeals has approved the departure from the anticipated and usual judicial and administrative proceedings so as to require the exercise of this Court's power of supervision in order to insure consistency in the application of the immigration laws and to remove the judiciary from the determination of an illegal alien's status under the immigration laws of the United States.

1. The opinion of the Court of Appeals should be reviewed because it is in direct conflict with the prior decision of this Court in *Sure-Tan v. N.L.R.B.*, 467 U.S. 883, 104 S. Ct. 2803, 81 L.Ed. 2d 732 (1984) and the immigration laws of the United States.

Increasingly, illegal aliens are pursuing legal remedies in reliance upon the state and federal laws with regard

to personal injury, unfair labor practice, property damage, etc. Thus, the judiciary is placed in the delicate position of enforcing the rights of the illegal alien in accordance with constitutional due process while at the same time upholding the immigration laws of the United States in its legal decisions. In this regard, Hernandez was entitled to pursue a cause of action against the vessel owner in accordance with 33 U.S.C. § 905(b) and recover proper damages in accordance with *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S. Ct. 2541, 76 L.Ed.2d 768 (1983). Nevertheless, since Hernandez was an illegal alien without any right to remain in the United States, the award of damages for his continued violation of the law of the United States in the decision of the Court of Appeals cannot be sustained. Furthermore, the enforcement of the immigration laws in this case will not lead to any hardship because Hernandez secured a generous monetary recovery for his injuries; and, if he cannot establish his legal right to remain in the United States, then the award of future Mexican medical expenses and wages will treat Hernandez fairly and in the same manner as any other illegal alien. In addition, this decision provides a vehicle for the Court to clarify the obligation of the judiciary to enforce the immigration laws of the United States and to require an illegal alien to prove his legal right to remain in the United States to obtain future damages in a cause of action governed by Federal law in accordance with *Sure-Tan.*

Congress and the country have recognized for some time that the enforcement authority provided by the Act has been somewhat ineffective in stemming the tide of rising illegal immigration into the southwest part of the United States from Mexico because of the higher wages available to Mexican citizens in the United States. In

fact, these are the very factors which led Congress to pass the Immigration Reform and Control Act of 1986, and the legislative history demonstrates that the primary purpose of the legislation was "to close the back door on illegal immigration so that the front door on legal immigration may remain open" by curtailing further illegal immigration through employer sanctions. H.R. Rep. No. 682(I), 99th Cong., 2d Sess., *reprinted in* 1986 *U.S. Code Cong. & Admin. News* 5649, 5650. Therefore, the decisions of the lower courts should demonstrate a commitment to enforce the immigration laws of the United States in the same manner as required by *Sure-Tan,* but the decision of the Court of Appeals approves the District Court's disregard for such laws in the litigation of a federal cause of action.

The opinion of the Court of Appeals dated March 30, 1988, accepted Dianella's position that *Sure-Tan, supra,* required Hernandez, as an illegal alien, to prove his right to remain in the United States legally before he could recover future damages on the basis of wages and medical expenses in the United States; however, the lower court affirmed the award of the District Court because the Immigration Reform and Control Act of 1986 allowed Hernandez to remain in the United States legally. Nevertheless, after consideration of Dianella's Petition for Rehearing and Suggestion for Rehearing En Banc, the Court modified the prior opinion in its per curiam opinion dated June 20, 1988, as follows:

> "Part B(ii) of this Court's opinion of March 30, 1988, 841 F.2d 582, which concluded that Hernandez had demonstrated his eligibility for permanent resident status under the Immigration Reform and Control Act, was improper and that part of our opinion is hereby withdrawn. . . ."

(App. C, p. 44a)

The basis of the per curiam opinion in awarding an illegal alien future U. S. wages and medical expenses was the determination by the Court of Appeals that *Sure-Tan* did not apply to the cause of action by an illegal alien under the LHWCA, 33 U.S.C. § 905(b), as follows:

> "As a private citizen, Dianella's relationship to Hernandez is not the same as the plaintiffs' relationship to their employer in *Sure-Tan,* in which a back-pay remedy applied by the National Labor Relations Board was found to implicate labor policy considerations."

(App. C, p. 46a)

Therefore, although the Court of Appeals agreed that an illegal alien could not recover future United States wages under the labor laws unless he established his legal presence in the United States, the Court of Appeals held that Dianella had the burden of proof to show the illegal alien "was about to be deported or would surely be deported" to deny recovery of future United States wages and medical expenses in a cause of action under the Longshore & Harbor Workers' Compensation Act. (App. C, p. 46a)

Although Dianella did not introduce evidence that Hernandez would definitely be deported, Dianella clearly established by the evidence and the case law that Hernandez was an illegal alien in violation of the laws of the United States by his presence in the United States at the time of the injury and at the time of trial; and Hernandez could only remain in the United States if he continued to evade detection by the Immigration Service. The undisputed evidence demonstrated that he had been deported on numerous occasions; that his wife and children resided permanently in Mexico; that Hernandez peri-

odically visited his family in Mexico; that all his children in Mexico had been born while he worked in the United States; and the Immigration Service allowed his wife to enter the United States on a visitor's visa until Hernandez was rehabilitated and could return to Mexico. Nevertheless, the District Court relied only on Hernandez' desire to remain in the United States to award damages on the basis of U. S. wages and medical expenses.

The Court of Appeals' decision erroneously limited the application of this Court's decision in *Sure-Tan* to cases involving the labor laws of the United States. Nevertheless, this Court's opinion in *Sure-Tan* clearly shows that the burden is on the illegal alien to prove his legal presence in the United States because of the immigration laws of the United States. The pertinent part of the *Sure-Tan* decision is as follows:

> "Nonetheless, as the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important Congressional objective,' Southern S.S. Co. v. N.L.R.B., 316 U.S. 31, 47, 86 L.Ed. 1246, 62 S. Ct. 886 (1942)—to-wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offer of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. . . ."

467 U.S. at 903, 81 L.Ed.2d at 750.

Sure-Tan is consistent with the immigration laws of the United States in placing the burden on the illegal alien to prove that he is entitled to be admitted into the United States in order to obtain future damages. 8 U.S.C. § 1361. In contrast, the decision of the Court of Appeals improperly shifted the burden of proof to Petitioner to demonstrate "that Hernandez was about to be deported or would surely be deported" contrary to the burden of proof imposed on Hernandez by the *Sure-Tan* decision and the immigration laws. 8 U.S.C. § 1361. Hernandez' intent to remain in the United States is irrelevant in determining his legal status, and such intent is only relevant in determining that Hernandez would continue his illegal activities in violation of the immigration laws. In fact, the decision of the lower courts and this Court clearly establish that the law requires a presumption that public officials will properly enforce the law. *See F.C.C. v. Shreiber,* 381 U.S. 279, 85 S. Ct. 1458, 14 L.Ed.2d 383 (1965); *Parsons v. U.S.,* 670 F.2d 164, 229 Ct. Cl. 335 (1982). This presumption is consistent with the burden of proof on Hernandez to establish his legal right to remain in the United States because the law presumes that the Immigration Service will apprehend and deport Hernandez. Therefore, the Court of Appeals erred as a matter of law in transferring the burden of proof to Petitioner in affirming the incorrect District Court's determination that Hernandez was entitled to recover future United States wages and medical expenses.

In conclusion, in *Sure-Tan,* this Court ruled that an illegal alien could not recover future United States wages until he proved his legal right to remain in the United States and the purpose of such decision was to avoid a

conflict between the immigration laws and another federal law. Although *Sure-Tan* is a labor case, Dianella respectfully submits that *Sure-Tan* requires Hernandez to bear the burden of proof to establish his legal status; and the per curiam opinion of the Court requiring Dianella to prove "that Hernandez was about to be deported and would surely be deported" is inconsistent with *Sure-Tan* and the Congressional objectives in the immigration laws of the United States. Therefore, the decision of the Court of Appeals destroys the consistency in the application of the immigration laws with other federal laws, such as the LHWCA, 33 U.S.C. § 905(b); and this Court should review the decision of the Court of Appeals to insure consistency in the application of the rights of litigants under federal law.

2. The opinion of the Court of Appeals should be reviewed because it erroneously establishes the authority of the District Court to determine an illegal alien's right to remain in the United States or to be deported even though Congress has assigned such determination exclusively to the executive branch of government.

The power to regulate the immigration of aliens into the United States is unquestionably a federal power. *De Canas v. Bica,* 424 U.S. 351, 96 S. Ct. 933, 47 L.Ed.2d 43 (1976). The Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.,* provides for the legal entry of aliens into the United States. The Attorney General has the responsibility and authority to enforce the immigration laws with regard to the legal admission or deportation of aliens. 8 U.S.C. § 1103. The executive branch of the government, through the Immigration Service, has the power to fashion necessary policies to

protect the borders and to insure the orderly entrance or deportation of aliens. *Jean v. Nelson,* 711 F.2d 1455 (5th Cir. 1983), *aff'd,* 472 U.S. 846, 105 S. Ct. 2992, 86 L.Ed.2d 664 (1985). In this connection, 8 U.S.C. § 1105a provides the judiciary a limited and exclusive function to review orders of deportation and exclusion. Nevertheless, the Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.,* does not authorize the judiciary to make any determination in the first instance of whether an illegal alien is entitled to remain in the United States or should be deported. Congress has invested this authority exclusively in the executive branch and specifically in the Immigration Service. 8 U.S.C. § 1252(b) provides that the procedure adopted by the Immigration Service "shall be the sole and exclusive procedure for determining the deportability of an alien." Likewise, this Court's decision in *Landon v. Plasencia,* 459 U.S. 21, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982) reaffirms the authority of the Immigration Service for determining deportability or exclusion of illegal aliens.

Since a determination with regard to Hernandez' legal right to remain in the United States was necessary to the decision of the District Court, then the District Court should have referred Hernandez to the Immigration Service in accordance with Dianella's request. The opinion of the Court of Appeals affirmed the District Court's finding of damages on the basis of United States wages and medical expenses because Petitioner failed to meet its burden of proof to show "that Hernandez was about to be deported or would surely be deported." Nevertheless, Congressional enactments and previous decisions of this Court establish that the question of Hernandez' right to remain in the United States or be deported to Mexico

is exclusively in the jurisdiction of the Immigration Service and not the judiciary. Likewise, 8 U.S.C. § 1361 clearly provides that the illegal alien has the burden of proof to establish his legal right to remain in the United States.

Although the decision of the Court of Appeals might be distinguished on the basis of a determination of the damage issue, the decision of the Court of Appeals involves the judiciary in determinations with regard to the immigration laws of the United States, when such laws have been committed to the discretion of the executive branch of the government. Furthermore, the decisions of the District Court and Court of Appeals raise serious questions concerning the commitment of the judiciary to enforce the immigration laws of the United States. Although the District Court may not agree with the immigration law, the District Court had the legal duty to enforce the existing law and to refer Hernandez to the Immigration Service for a determination of his legal status if the District Court accepted his testimony that he intended to remain in the United States in violation of the immigration laws. The opinion of the District Court and the Court of Appeals has placed the judiciary in the position of condoning the alien's illegal activity when the alien testified live in a United States Court that he had violated the law and intended to continue to violate the law until the Immigration Service apprehended him and returned him to Mexico.

This case was tried by the District Court sitting in the Federal Building in Houston, Texas, and the Immigration Service had its regional office in the same building. The evidence was developed that Hernandez was an illegal

alien without any valid basis for remaining in the United States. The District Court did not refer Hernandez to the Immigration Service on its own initiative, and the District Court refused Dianella's request that the Court refer Hernandez to the Immigration Service for determination of his status as a prerequisite to the award of United States future wages and medical expenses. This was clearly an error. The District Court in the first instance and the Court of Appeals in the second instance should have stayed their decisions as to damages pending determination of Hernandez' status by the Immigration Service. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 383 U.S. 932, 86 S. Ct. 781, 15 L.Ed.2d 709 (1966); *Nader v. Allegheny Airlines, Inc.,* 426 U.S. 290, 96 S. Ct. 1978, 48 L.Ed.2d 643 (1976); *Weinberger v. Bentex Pharmaceuticals, Inc.,* 412 U.S. 645, 93 S. Ct. 2888, 37 L.Ed.2d 235 (1973). In addition, the District Court rejected the legal argument that Hernandez' entitlement to remain in the United States should be judged on the basis of the immigration laws of the United States.

The obligation of the judiciary to uphold and enforce the immigration laws of the United States in the circumstances of this case is illustrated by the duty of private citizens under criminal laws regarding illegal immigration. 8 U.S.C. § 1324(a)(1)(C) makes it a criminal offense if any person "knowingly or in reckless disregard of the fact that an alien . . . remains in the United States in violation of the law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection any alien in any place. . . ." The term "shields" has been interpreted to apply to activities by any person who substantially assists or facilitates the alien in re-

maining in the United States illegally. *United States v. Cantu,* 557 F.2d 1173 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063, 98 S. Ct. 1236, 55 L.Ed.2d 763 (1978). *See United States v. Pereira-Pineda,* 721 F.2d 137 (5th Cir. 1983); *United States v. Lopez,* 521 F.2d 437 (5th Cir.), *cert. denied,* 423 U.S. 995, 96 S. Ct. 421, 46 L.Ed.2d 368 (1975). Furthermore, 8 U.S.C. § 1324 (a)(1)(D) makes it a criminal offense if any person "encourages or induces an alien to reside in the United States, knowingly or in reckless disregard of the fact that such . . . resident is or will be in violation of the law."

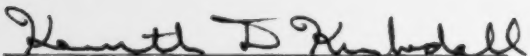
Of course, Petitioner does not contend that the District Court or the attorneys representing either party were in violation of the criminal statutes of the United States for not reporting Hernandez to the Immigration Service. Nevertheless, Petitioner does contend that the judiciary has an obligation to enforce the laws of the United States and cannot disregard illegal activity when such illegal activity is committed and continues in the courtrooms of the United States in the litigation of any case. For example, if a witness admits that he committed perjury in a trial in the Federal Court, then the federal judge should not refuse to refer the admitted perjurer to appropriate authorities for possible criminal charges. Therefore, this Court should grant the Petition for Writ of Certiorari to correct the actions of the lower court in refusing to apply the immigration laws of the United States and to insure that the federal judiciary enforces the immigration laws instead of condoning and rewarding such violations with significantly increased damages on the assumption that the illegal alien will be able to continue to violate the immigration laws of the United States.

CONCLUSION

The decision of the Court of Appeals should be reviewed because such decision is inconsistent with the decision of this Court in *Sure-Tan v. N.L.R.B. Sure-Tan* establishes that the immigration law requires the illegal alien to prove his legal right to remain in the United States as a prerequisite for the award of future United States damages in a cause of action under federal law, and this Court's decision in *Sure-Tan* is not limited to labor cases. Therefore, the Court should grant this Writ of Certiorari for the purpose of correcting the decision of the lower court, which refused to apply the policy reasoning and principle in *Sure-Tan* because this case is not a labor case. Furthermore, the decision of the District Court in finding that Hernandez intended to remain in the United States in violation of the immigration laws and then awarding United States future wages and medical expenses is inconsistent with the enforcement of the immigration laws of the United States. The District Court should have referred Hernandez to the Immigration Service on its own initiative or in response to Dianella's request for determination of Hernandez' legal right to remain in the United States as a prerequisite for awarding future United States wages and medical expenses. Nevertheless, by the decision of the Court of Appeals in approving the action of the District Court, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court's power of supervision" in accordance with Supreme Court Rule 17. Therefore, for these

reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

By: 

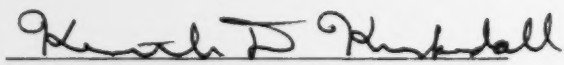
KENNETH D. KUYKENDALL
Attorney for Petitioner
Dianella Shipping Corporation

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
(713) 224-8380

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Petition for Writ of Certiorari has been mailed, certified mail, return receipt requested to Appellee's attorney, Stephen Hanks, Esq., Helm, Pletcher, Hogan, Bowen & Saunders, America Tower, 2929 Allen Parkway, Suite 2700, Houston, Texas 77019-2120, and to Intervenor's attorney, Gray Miller, Esq., Fulbright & Jaworski, 1301 McKinney Street, Houston, Texas 77010, on this 14th day of October, 1988.



OF ROYSTON, RAYZOR, VICKERY
& WILLIAMS

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-5731

ALEJANDRO HERNANDEZ

v.

M/V RAJAAN, her engines, tackle, etc., *in rem*, and DIANELLA SHIPPING CORP.

v.

ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES, LTD.; CARGILL, INC.; BRAZOS RIVER HARBOR NAVIGATION DISTRICT; AFFILIATED RICE MILLS; TRANS OCEAN AMERICA, INC.; LANGSTON COMPANIES, INC., CONTINENTAL BAG DIVISION; AMOCO FABRICS CO.; EURO GRAIN TRADING, LTD.; GENERAL PRODUCE AND FIBRES, LTD; WEST TEXAS RICE CO.; O.J.I. SEIKE-KOGYO KABASHIKI KAISHA; and SYNTHETIC INDUSTRIES TEXAS, INC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been tried upon the facts without a jury, the Court hereby enters the following Findings of Fact and Conclusions of Law, pursuant to Rule 52(a), F. R. Civ. P.

FINDINGS OF FACT

1. Plaintiff Alejandro Hernandez is a thirty-two year old Mexican citizen who was employed as a longshoreman by Young & Company, a contracting stevedore, when he was injured working aboard the M/V RAJAAN on September 21, 1983, near Freeport, Texas.

2. The M/V RAJAAN is a combination bulk carrier, general cargo ship of Liberian registry which was owned by Defendant (and Third-party Plaintiff) Dianella Shipping Corporation ("Dianella") on September 21, 1983. The ship has six cargo holds, and it is equipped with hydraulic winches which serve these holds. The winches have a hydraulic remote control system to allow operation of both winches by a single worker. The winches and remote control system are located atop the vessel's mast houses.

3. Third-party Defendant Ishikawajima-Harima Heavy Industries Company, Ltd. ("IHI") is the Japanese company which built the M/V RAJAAN and manufactured the hydraulic winches.

4. Third-party Defendant O.J.I. Seiki-Kogyeo Kabashiki Kaisha ("OJI") is the Japanese corporation which made the Marol Hydraulic Remote Control System ("the remote control") installed onboard the M/V RAJAAN. IHI purchased the remote control from OJI for use on the vessel.

5. Third-party Defendant Affiliated Rice Mills ("Affiliated") is a successor in interest to Third-party Defendant West Texas Rice Company, for all purposes of this lawsuit. Affiliated is a business located in Alvin, Texas which mills and bags rice for shipment overseas.

6. Affiliated used polypropylene sacks for the shipment of rice aboard the M/V RAJAAN during the timeframe material to this lawsuit. At its plant, Affiliated filled the polypropylene sacks with rice and stowed them on wooden pallets in a cross-tiered, interlocking fashion. The pallets were then placed aboard flatbed trucks by

forklift machines for transport to the port of Freeport, Texas. Each bag weighed 50 kilos (110 pounds). Each pallet contained thirty bags, stacked six to a row by five rows high.

7. Third-party Defendant Langston Companies, Inc., Continental Bag Division ("Langston") is a manufacturing business located in Crawley, Louisiana. Langston manufactured the polypropylene bags in question and sold them to Affiliated.

8. Third-party Defendant Cargill, Inc. ("Cargill") originally purchased the rice from Affiliated for resale to the government of Iraq. The Iraqi government routinely issues "rice tenders" for specified quantities of rice from American traders. These tenders specify that the rice is to be packaged in single 50-kilo polypropylene bags.

9. Cargill purchased the rice from Affiliated on an F.A.S. basis. Cargill specified that the rice be packaged in accordance with the Iraqi tenders.

10. Cargill subsequently sold the rice shipment to Third-party Defendant Euro Grain Trading, Ltd. ("Eurograin"), another rice trading company, in August, 1983. Eurograin thereafter chartered the M/V RAJAAN from Dianella. Eurograin owned the rice shipment at the time of Plaintiff's injury.

11. Third-party Defendant Brazos River Harbor Navigation District ("Brazos") is a governmental authority which provided the M/V RAJAAN with berthing, water and other necessities from September 19 through September 23 of 1983. Defendant Dianells agreed to abide by the rules and regulations promulgated by Brazos in its tariff.

12. The rice bags were palletized by Affiliated on wooden pallets provided to it by Brazos. Affiliated then shipped the rice by truck to warehouse facilities at the port of Freeport for storage pending overseas shipment. The warehouses were owned and operated by Brazos.

13. Third-party Defendant Trans Ocean America was dismissed from the case by this Court on October 5, 1984 for failure to state a claim against it. Third-party Defendant General Produce and Fibres, Inc. was similarly dismissed on January 25, 1985. Dianella orally moved to non-suit its claims against Third-party Defendants Amoco Fabrics Company and Synthetic Industries Texas, Inc. Accordingly, the claims against these Defendants will be dismissed by the Court.

14. Intervenor Texas Employers' Insurance Association was the insurance carrier for Plaintiff's employer at the time of Plaintiff's injury. Intervenor has paid (through the time of trial) at least $159,585.91 in compensation and medical benefits on Plaintiff's behalf.

15. The M/V RAJAAN commenced its voyage in Honduras and was en route to Aqaba, Jordan, with intermediate calls at Freeport, Texas and Pensacola, Florida to load rice cargo for delivery in Jordan. The vessel docked in Freeport on September 19, 1983 with its starboard side to the berth's dock.

16. The ship began loading palletized sacks of rice into various cargo holds, including the No. 2 hold, at about 1:00 p.m. on September 20, 1983, using the ship's winches.

17. The cargo winch on the starboard side of the forward end of the No. 2 hold began malfunctioning

near the outset of cargo loading operations. The winch would slow down or stop unexpectedly while palletized rice bags were being loaded onboard the vessel.

18. The cargo winches were rigged in a so-called "union purchase" arrangement, meaning that both the port and starboard winches at each hatch were attached to the palletized loads. Each load would be hoisted up from the dock and then moved horizontally to a position over the hatch. This manuever was accomplished by letting out (lowering) the starboard winch and raising (heaving) the port winch. The port winch would properly continue to heave when the starboard winch occasionally slowed or stopped, resulting in a jerking motion or swing of the pallet as it was being moved over the deck.

19. Two longshoremen operated the winches for the No. 2 hold, each one of them operating it for an hour at a time. In the middle of the afternoon on September 20, 1983, the operator notified his foreman that the No. 2 starboard winch was not working properly. The stevedore's walking foreman, who supervised the loading operation on board the vessel, in turn notified the ship's crew. The crew, supervised by the second engineer, added hydraulic fluid to the wayward winch by means of a hand pump. The ship's crew then announced that the winch had been repaired and that loading operations should resume.

20. The problems with the No. 2 starboard winch continued intermittently on September 21, 1983. Several complaints were lodged with the ship's crew by the walking foreman pertaining to these difficulties. The crew, on two occasions, again added hydraulic fluid by using

a hand pump on September 21, 1983. On each of these occasions, the ship's crew sent the longshoremen back to work after pronouncing the winch to be sound.

21. The second occasion for the adding of the fluids on September 21 occurred less than one hour before the incident which caused Plaintiff's injury.

22. At about 4:00 p.m. on September 21, 1983, the winch operator working the No. 2 hold was moving a pallet of bagged rice over the cargo hold. The starboard winch abruptly stopped, causing the pallet to jerk and begin swinging just as it passed over the edge of the hatch. The resultant force of this jerking motion dislodged at least one 110-pound rice bag from the pallet. The rice bag fell and struck Plaintiff on his upper back.

23. The Plaintiff was working as a longshoreman at the time of the injury, and had been employed as a longshoreman for the three years immediately preceding his injury.

24. The Plaintiff was rendered a permanent T-5 paraplegic by the rice bag, which landed on his upper back and fractured his spine. He is completely paralyzed from the level of the nipple area of his chest downward. The Plaintiff, now age thirty-two, is confined to a wheelchair for life. Moreover, he sustained injuries to the left and right brachial plexus, thereby suffering limited use of, and diminished sensation in, his arms. He has been recently diagnosed as having a spinal cyst, which may or may not cause further medical complications in the future. Plaintiff has lost both bladder and bowel control, and he can no longer enjoy sexual relations with his wife. His formal education is minimal, and the combination of his severe injuries with his low level of schooling and

training leaves him unemployable. Moreover, his limited intellectual skills make it difficult for him to compensate for the loss of his physical abilities.

25. There is some evidence that the operators were operating the winches in a rough manner when they began loading operations on September 20. This problem was apparently resolved, however, during the early afternoon of the 20th, after the operators' supervisor admonished them at the request of the ship's officers. Further, a member of the ship's crew stated that he observed the winch operators for the No. 2 hold during the day of the accident (the 21st) and that they were operating the winch in a proper manner. Based on the foregoing, and on the other evidence heard at trial, the Court finds that Plaintiff's injury was not caused by any negligence or fault on the part of the winch operators.

26. The Court finds that the Plaintiff's injury was caused by the malfunction of the starboard winch control discussed earlier. This malfunction was the same problem brought to the attention of the vessel's crew and officers on several prior occasions.

27. The crew and officers of the M/V RAJAAN, including the second engineer (who was primarily responsible for maintenance and repair of the ship's winches), had actual knowledge, prior to the incident which caused Plaintiff's injuries, that the winch was malfunctioning. Further, as noted above, the crew and officers not only had actual knowledge that the longshoremen would continue to load cargo and to use the malfunctioning winch, they told the longshoremen on three occasions that the winch had been repaired and that loading operations should resume.

28. Based on the foregoing, the Court finds that the ship's officers and crew breached the duty owed to the longshoremen to remedy the hazard. By failing to either fully and competently repair and maintain the winch or else take it out of service, the officers and crew negligently breached their duty, and such negligence caused the Plaintiff's injury.

29. Plaintiff was an experienced longshoreman. He knew, or reasonably should have known, that he should not have remained in the area of the open hatch square as palletized cargo was being moved over it. A warning shout was given by the winch operator as the load neared the hatch square, as was usually done, and Plaintiff failed to move quite as quickly in response to the warning as he reasonably should have. This failure is mitigated by the fact that he was still in the process of unloading the previous pallet when the warning came and by the fact that his path to safety was somewhat impeded by the presence of that pallet.

30. The winches onboard the vessel did not have any design, manufacturing or marketing defects. The winches were not unreasonably dangerous.

31. The remote control had no defects in marketing, design or manufacture. It was not unreasonably dangerous.

32. IHI and OJI provided adequate warnings and instructions to the vessel's crewmembers and the stevedore's employees concerning appropriate methods for maintaining the winches and remote control and for correcting such operational or mechanical problems as were reasonably foreseeable under the relevant circumstances.

33. The Court finds that neither IHI nor OJI committed any acts or omissions which constitute negligence. Further, no facts have been shown to establish liability for the design, manufacture, or marketing of defective or unreasonably dangerous products. Finally, neither OJI nor IHI breached either express or implied warranties of any sort.

34. Affiliated (the successor to West Texas Rice Company) palletized the rice bags using practices which are customary in the pertinent industry. Dianella contends that Affiliated was negligent, in that the bags were not secured to the pallet by means of slings, stretch-wrapping or shrink-wrapping. The Court does not concur with this contention. Approximately 98% of all rice cargoes are shipped within and from the United States in precisely the manner used by Affiliated. Further, the additional methods of pre-slinging and the like are not economically feasible or functionally practicable for the handling of such cargoes. The Court finds that Affiliated palletized the rice bags in a manner consistent with ordinary prudence. Affiliated's conduct was reasonable and non-negligent in light of the relevant circumstances.

35. Dianella contends that the polypropylene bags were defective or were negligently manufactured by Langston. The gist of this argument is that the bags were too slippery to be safe. The argument is without merit. There is no evidence that the bags failed to meet applicable governmental standards or failed to comply with the specifications of the party (or parties) responsible for ordering the bags. Dianella has shown no defect in the design, manufacture or marketing of the polypropylene sacks, nor is there sufficient evidence to support a finding of any negligence on the part of Langs-

ton. Langston breached no warranty, either express or implied.

36. The decision to use polypropylene bags for the cargo of rice was reasonable and non-negligent. Further, the decision comported with established industry practices. The Court can discern no facts upon which it could find that the Third-party Defendants Cargill, Eurograin, or Brazos either acted negligently or negligently failed to do some act required of them by any cognizable duty. Similarly, these Defendants breached no warranty of any sort, and they committed no acts upon which a theory of strict liability could be sustained.

37. The Court finds that Plaintiff's injuries were proximately caused by the concurrent negligence of Defendant Dianella and the Plaintiff. This negligence must be apportioned.

38. The Plaintiff's negligence essentially consists of a split-second of ill-timing. Another step or two toward the safety area of the cargo hold would have prevented the accident. When the rather slight magnitude of this factor is combined with the mitigating circumstances surrounding Plaintiff's negligence (discussed earlier), it is reasonable to find that the percentage of fault attributable to the Plaintiff is 5%. The remaining 95% must be assessed against Dianella. The Court therefore finds that Plaintiff was 5% at fault and that Defendant Dianella was 95% at fault.

39. The Court finds that Plaintiff is permanently and totally disabled, and he will not obtain gainful employment during the remainder of his natural life.

40. The Court finds that, in all reasonable probability, the Plaintiff will be permitted to continue re-

siding in the United States for an indefinite period; and, he will receive medical and attendant care here for the foreseeable future. He intends to reside here permanently.

41. We must determine the present value of Plaintiff's future economic losses by use of the below-market discount rate method. This method represents the real rate of after-tax dollars with adjustments for future inflation. The below-market discount rate is applied to the projected income stream of the Plaintiff. The income stream is based on a consideration of past wages, productivity, fringe benefits, and the reasonably anticipated wage increases which will result from all factors other than inflation. In the instant case, we begin by considering Plaintiff's past wages. Plaintiff was earning $14.00 per hour at the time of his injury. He was a "casual" worker on the docks, meaning that his employment was not as steady as those longshoremen who had more seniority than Plaintiff. As a result of this "casual" status, his gross income for the years preceding the incident causing his injury was somewhat less than might be expected for a worker making $14.00 per hour. Specifically, his income in 1980 was $8,341.00; in 1981, it was $8,634.00; and in 1982, it was $6,500.00. (The injuries occurred in 1983.)

42. If Plaintiff had not been injured, it is more likely than not that he would have continued working as a longshoreman. He would have gained seniority and thus would have enjoyed increased work-hours. Further, his increased experience would have resulted in increased job productivity.

43. Based on a consideration of the testimony of Dr. Everett Dillman, an economist, concerning the relevant

factors which should produce a reasonable below-market discount rate, the Court finds that the applicable discount rate lies between 1% and 1½%.

44. Dr. Dillman presented competent and reliable evidence on the wage increases Plaintiff would have received due to non-inflationary factors, including productivity. He compared wage increases in the general work force to yearly earnings on tax-free municipal securities for the years 1947 through 1983. Since inflation generally has an equal impact on wages and interest rates, this comparison shows the difference between non-inflationary wage increases and the below-market discount rate. Based on the foregoing analysis, Dr. Dillman concluded that the average increase in wages has been 0.85% higher than the average yields on tax-free municipal securities. Hence, subtracting inflation from both sides of the equation yields a non-inflationary wage increase which has been 0.85% higher than the "real" interest (i.e., non-inflationary market interest) which could have been earned on tax-free municipal securities.

45. The Court finds Dr. Dillman's historical and economic analysis concerning future wage increases and the application of the discount rate to be highly persuasive. The result of his analysis is that wages can be expected to increase in the future by a factor of 0.85% *more* than the below-market discount rate. Hence, the Court must discount future income losses by a factor of negative 0.85% to compute the present value of his lost future wages.

46. Plaintiff had a work-life expectancy through age 60. Using generally-accepted labor statistics for longshoremen, and applying the average annual wage in-

creases as adjusted by proper discount factors, the Court finds that the present value of Plaintiff's lost future wages is $800,221.00, including fringe benefits.

47. The next item of pecuniary losses suffered by Plaintiff concerns household services. The Plaintiff, in all likelihood, would have performed household services at an average of ten hours per week through age 72 (his life expectancy). Multiplying those hours by the federal minimum wage, and then adjusting the resultant figure by a discount rate of negative 0.85% yields a present value for those services of $87,471.00. Plaintiff will be unable to perform these services and therefore he should recover reasonable compensation for this loss. The Court finds that $87,471.00 constitutes a reasonable recovery for lost household services.

48. Plaintiff incurred reasonable and necessary medical expenses of $153,472.48 from the date of his injury through December 1984. (The case was tried in late January of 1985.) The Court finds that Plaintiff should recover that amount for his past medical expenses.

49. Based on the testimony of various medical personnel, including Plaintiff's treating physician, the Court finds that Plaintiff will incur $10,000.00 per year in future medical and hospital expenses (exclusive of attendant care and medical commodities) for the rest of his life. Discounting this amount to present value, and considering the impact of a 1.67% non-inflationary rate of annual increases for medical care, the Court finds that Plaintiff will incur $582,000.00 in future medical and hospital expenses.

50. The Court heard evidence concerning the extensive degree of attendant care Plaintiff will need in the

future. Based thereon, and assuming that Plaintiff's physical condition will not significantly deteriorate over the years, the Court finds that the cost of Plaintiff's necessary attendant care will be $12,547.60 per year. Using the same methodologies discussed above, the Court finds the present value of Plaintiff's attendant care to be $730,-000.00.

51. Plaintiff will need a number of medical commodities throughout the remainder of his life, including prescription drugs, suppositories, catheters, lotions, plastic gloves, a wheelchair, a hospital bed, and related items. The Court finds the present value of these items to be $152,000.00.

52. A person suffering from paraplegia generally incurs utility bills which are as much as 20% above the normal consumption rate for healthy persons living in dwellings of similar size. This is so because there is a greater need to control a paraplegic's environment so as to minimize the risks of various medical illnesses which flow from placing a paraplegic in an uncontrolled environment. Further, due to bowel and bladder accidents (for example, catheters frequently loose their proper position when used by paraplegics), cleaning and laundering costs are higher than those found in the general population. In order to have any significant mobility outside the home, a paraplegic needs to use a modified van, a wheelchair lift, and other related equipment. The Court finds that the reasonable costs of the foregoing non-medical commodities, discounted to present value, to be $465,-000.00.

53. The total amount of the Plaintiff's pecuniary losses, discussed in Findings 39 through 52, is $2,969,-

693.48. This amount will adequately compensate the Plaintiff for his pecuniary damages.

54. Plaintiff has suffered, and will continue to suffer, physical pain and enormous mental anguish. The Court has earlier noted the catastrophic nature of Plaintiff's injuries in Finding 24. After carefully considering the nature and effects of these injuries, and after having observed the Plaintiff at length in court, this Court has determined that Plaintiff's non-pecuniary losses (i.e., his pain and suffering) will be adequately compensated by the award of $1,000,000.00.

55. Plaintiff contends that the evidence would support the imposition of punitive damages. The Court does not agree. The crew and officers of the vessel had actual knowledge of the malfunction in the winch. They tried to repair it and failed to do so on several occasions. By failing either to competently repair the winch or else to take it out of service, they were certainly negligent. Further, they knew that the Stevedore relied upon their assurances that the winch was fixed and that loading operations should resume. It is not clear, however, that either the ship's engineer or the crew actually *knew* that their attempts to repair the winch would not solve the problem. Further, Plaintiff's contention that the crew merely "put on a show" when attempting to repair the winch is not supported by a preponderance of the credible evidence. The fact that, after the incident in question, the chief engineer may have prevented certain matters concerning the malfunctioning winch from being entered in the ship's log does not call for the imposition of punitive damages. While such behavior is reprehensible, it does not show reckless, wanton or egregious actions which

proximately caused Plaintiff's injuries. Moreover, Plaintiff has not established that the shipowner actually ratified or authorized the negligent conduct of his officers and crew. The evidence is simply insufficient to support an award of punitive damages, especially in light of the pertinent legal standards which will be discussed below.

56. The total amount of Plaintiff's damages is $3,969,693.48. When this is reduced by 5% (to account for Plaintiff's percentage of fault), the result is $3,771,208.80. The Court therefore finds that Plaintiff's recoverable damages amount to $3,771,208.80, together with an award of prejudgment interest.

CONCLUSIONS OF LAW

1. This is a Rule 9(h) maritime proceeding. The cause of action is based on 33 U.S.C. § 905(b). The Court has jurisdiction of the case pursuant to 28 U.S.C. § 1333.

2. Generally, a shipowner may rely on the stevedore to avoid exposing longshoremen to unreasonable hazards. 33 U.S.C. §§ 905(b) and 941; *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 170 (1981). The shipowner is not liable for injuries caused by dangers unknown to him and about which he had no duty to inform himself. *Scindia,* at 172. However, there are circumstances in which the shipowner does have a duty to act where the danger to longshoremen arises from some malfunctioning of the ship's gear which is being used in cargo operations. These circumstances include a situation where the shipowner should anticipate that the stevedore will not or cannot correct the danger. *Id.,* at 174-175.

3. A shipowner who has actual knowledge that a hazardous condition exists due to a malfunction in one of the ship's winches which arises during cargo-loading operations, and who has actual knowledge that the stevedore will continue to use the winch in its hazardous condition without remedying the situation, has a duty to the longshoremen to intervene and either repair the winch or take it out of service. *Webster v. M/V MOOLCHAND,* 730 F.2d 1035 (5th Cir. 1984). Even if both the stevedore and the shipowner are at fault in improperly dealing with such a situation, an injured longshoreman is entitled to recover the entire amount of his damages from the shipowner, limited only by the percentage of any negligence directly attributable to the longshoreman himself. *Id.; Lopez v. A/S D/S SVENDBORG,* 581 F.2d 319 (2d Cir. 1978).

4. If the vessel owner is found to be negligent, the question of whether the longshoremen-plaintiff was himself negligent must also be considered. *E.g., Wiles v. Delta Steamship Lines, Inc.,* 574 F.2d 1338, 1339 and cases cited therein (5th Cir. 1978). If the plaintiff was also negligent, the admiralty rules of comparative negligence apply. *Id.*

5. When the facts of the case are applied to these authorities, it is clear that Plaintiff may recover the full amount of his damages from Defendant Dianella, limited only by the percentage of fault attributable to his own negligence.

6. The Plaintiff's pecuniary damages, as found by the Court, comport with the requirements enunciated in *Culver v. Slater Boat Co. (II),* 722 F.2d 114 (5th Cir. 1983) (*en banc*) concerning the computation of dam-

ages for future pecuniary losses discounted to present value by means of the below-market discount rate method.

7. The award of $1,000,000.00 for pain and suffering is based on this Court's observation of the Plaintiff and our subjective determination of the amount needed to achieve full compensation, taking into account both the severity of his injuries and the finding that the award of pecuniary damages will adequately and reasonably compensate Plaintiff for his medical needs and lost future earning capacity. *See Sosa v. M/V LAGO IZABAL,* 736 F.2d 1028, 1035 (5th Cir. 1984).

8. Defendant Dianella argues that punitive damages may not be awarded under Section 905(b) of the Longshoremen's Act. There is authority to support this argument. First, the statutory language of Sec. 905(b) provides the "exclusive" remedy for injured longshoremen by allowing recovery "in the event of injury . . . caused by the *negligence* of the vessel (emphasis added)." A strict construction of this language would arguably foreclose the assertion of a recovery for gross negligence. Second, at least two courts have held that an action by a longshoreman against his employer under Sec. 905(a) for gross negligence cannot lie. *Houston v. Bechtel Associates,* 522 F.Supp. 1094 (D.D.C. 1981); *Garibay v. Decker,* 331 F.Supp. 1093 (S.D. Tex. 1971). On the other hand, the statutory language quoted above is not, in and of itself, dispositive of the issue, and the jurisprudential reasons for denying a cause of action for gross negligence against an *employer* do not necessarily control the issue of whether such a cause of action could lie against a *shipowner.* We have found no cases squarely on point. The question is apparently an unsettled one.

9. We need not decide whether a claim for gross negligence will lie against a shipowner under Sec. 905 (b). This is so because, in any event, the Plaintiff has failed to show evidence which would satisfy established principles of maritime law for the imposition of punitive damages. For example, in *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981), the Court noted that punitive damages are available under general maritime law where the facts show willful and wanton misconduct by the shipowner himself in the creation or maintenance of unseaworthy conditions. Similarly, an award of punitive damages for failure to pay maintenance and cure must be grounded on some egergious conduct of the shipowner exhibiting wanton and intentional disregard of a seaman's rights. *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 88 (5th Cir. 1984). At least one court has held that "the better rule" is that punitive damages are not recoverable against a shipowner for the acts of his vessel's master unless it can be shown that the owner ratified or authorized the acts of the master. *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1959), *cert. denied*, 398 U.S. 958 (1970). When the standards of either *Merry Shipping*, *Harper*, or *Fuhrman* are applied to the facts of this case, it is apparent that the Plaintiff has not established a right to recover punitive damages, assuming *arguendo* that he may even make such a claim under Sec. 905(b).

10. The allowance of prejudgment interest lies within the discretion of the admiralty trial judge. Its allowance in maritime cases is the rule, rather than the exception. *Webster, supra,* at 1040-1041 and cases cited therein. The Court therefore exercises its discretion to award Plaintiff prejudgment interest at the rate of 9% *per*

annum from September 21, 1983 (the date of the injury) to the date judgment is entered herein.

11. The Court concludes that Plaintiff is entitled to judgment against the M/V RAJAAN, *in rem*,[1] and Defendant Dianella Shipping Corporation in the amount of $3,771,208.80, together with post-judgment interest at the rate of 9% *per annum*.

12. The Court concludes that Dianella is not entitled to any recovery from any of the Third-party Defendants. Third-party Defendants Amoco Fabrics Company and Synthetic Industries Texas, Inc. are hereby dismissed from the lawsuit. Judgment on the merits will be entered for the remaining Third-party Defendants.

13. Intervenor Texas Employers' Insurance Associated is subrogated to the rights of the Plaintiff, and is entitled to recover the first $159,585.91 of any recovery made by Plaintiff, plus any amounts subsequently paid by the Intervenor to Plaintiff for compensation and medical benefits.

14. Finally, Defendant Dianella has raised the question of whether it is entitled to limit its liability to the value of the vessel plus pending freight, pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 181 *et seq*. Dianella has submitted an affidavit to the effect that the value of the vessel is approximately $2,400,000.00. No evidence has yet been tendered on the value of pending freight. (Dianella seeks a separate proceeding on the Limitation issue.) While the Court has

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1. A return of the writ of seizure issued for the vessel was made herein on September 30, 1983. The Court therefore has *in rem* jurisdiction over the ship.

not determined whether Dianella is even entitled to claim the benefit of the Limitation Act, a substantial question has been presented which may well affect the validity of any judgment herein exceeding $2,400,000.00. The issue must be determined by a post-judgment hearing and ruling thereon. The Court, therefore, deems it necessary to stay enforcement of a portion of the judgment, pursuant to Rule 62(b), F. R. Civ. P.

A Final Judgment will be entered in accordance herewith.

DONE in Houston, Texas, this _____ day of August, 1985.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX B

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Etc., and Dianella Shipping Corporation,
Defendants-Third Party Plaintiff-Appellants,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES,
LTD., Cargill, Inc., et al.,
Third Party Defendants-Appellees.

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Her Engines, Tackle, etc., in rem,
and Dianella Shipping Corporation,
Defendants-Appellants.

Nos. 85-2608, 87-2044.

United States Court of Appeals,
Fifth Circuit.

March 30, 1988.

Injured longshoreman brought action against shipowner and vessel to recover damages for personal injuries caused by falling sack of rice. Shipowner and vessel impleaded third-party defendants, who settled with longshoreman. The United States District Court for the Southern District of Texas, James DeAnda, J., found shipowner and vessel liable. Shipowner appealed. The Court of Appeals, Clark, Chief Judge, held that: (1)

shipowner was liable to longshoreman for damages caused by malfunctioning winch and falling bag of rice; (2) part-time longshoreman was not entitled to recover lost wages on basis of average wage rate, compensation for lost future benefits and seniority, compensation for lost ability to perform household services, and $446,400 for transportation expenses but was entitled to $1 million for pain and suffering; and (3) illegal alien longshoreman was entitled to damage award based on United States wage and medical rate.

Affirmed in part, vacated, and remanded.

Edward J. Hennessy, Helm, Pletcher, Hogan, Bowan & Saunders, Earl B. Austin, Baker & Botts, Houston, Tex., for Cargill, Inc.

David G. Matthiesen, Funderburk & Funderburk, Houston, Tex., for Langston Companies, Inc.

Stephen W. Hanks, Timothy H. Pletcher, Houston, Tex., for Hernandez.

Louis E. McCarter, Richard L. Lagarde, Houston, Tex., for Ishikawajima Harima Heavy Industries, Ltd.

Butler & Binion, Walker Beavers, Robert D. Arredondo, Houston, Tex., for Brazos River Harbor Navigation Dist.

Gray H. Miller, Fulbright & Jaworski, Houston, Tex., for Texas Employers' Ins. Ass'n.

John P. Forney, Jr., Houston, Tex., for Ohji Seiki-Kogyo Kabushiki.

Robert L. Adams, Houston, Tex., for Synthetic Industries, Inc.

Robert MacIntyre, Jr., Houston, Tex., for Euro Grain Trading, Ltd.

Edward J. Hennessy, Randall D. Wilkins, Houston, Tex., for Affiliated Rice Mills.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, BRIGHT* and POLITZ, Circuit Judges.

CLARK, Chief Judge:

The district court held a vessel owner liable to a longshoreman injured while loading palletized bags of rice into the vessel's cargo hold. We affirm that court's judgment of liability and portions of the damages awarded. We also affirm the rejection of the vessel owner's limitation of liability defense. We vacate, reverse or modify certain portions of the damages award we find to be erroneous.

On September 21, 1983, Alejandro Hernandez was partially paralyzed while working as a longshoreman aboard the M/V RAJAAN, a vessel owned by the Dianella Shipping Corp. The RAJAAN had docked in Freeport, Texas en route to Jordan to take on a cargo of rice. Hernandez, a thirty-two year old Mexican citizen, was helping to unload pallets of rice in the cargo hold of the RAJAAN. One of the hydraulic winches used to lower the pallets of rice malfunctioned and a 110-pound sack of rice fell onto Hernandez. As a result, he was permanently paralyzed from the chest down and retained only limited use of his arms.

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* Circuit Judge of the Eighth Circuit, sitting by designation.

Hernandez filed suit against Dianella, in personam, and against the M/V RAJAAN in rem. Dianella and the RAJAAN impleaded several third-party defendants.[1]

Hernandez settled with the third-party defendants for $410,000.00 before trial with the agreement that the settling defendants would be reimbursed if Hernandez's recovery exceeded $3,000,000.00. The Texas Employer's Insurance Association intervened and recovered $159,-585.91 in compensation and medical benefits paid to Hernandez.

The district court sitting without a jury found Dianella and the M/V RAJAAN liable under 33 U.S.C. § 905(b) (1986). It awarded Hernandez pecuniary and non-pecuniary damages in the following amounts:

Lost future wages	$ 800,221.00
Lost household services	$ 87,000.00
Past medical expenses	$ 153,472.48
Future medical expenses	$ 582,000.00
Attendant care	$ 730,000.00
Future medical supplies	$ 152,000.00
Transportation and non-medical commodities	$ 465,000.00
Pain and suffering	$1,000,000.00
	$3,969,693.48

1. These defendants were Ishikawajima-Harima Heavy Industries, Ltd. (the manufacturer of the winch); O.J.I. Seiki-Kogyo Kabshiki Kaisha (the manufacturer of the winch's remote control system); Affiliated Rice Mills (a successor in interest to the company which milled and bagged the rice); Langston Companies, Inc., Continental Bag Division (the manufacturer of the polypropylene bags which held the rice); Cargill, Inc. (which purchased the rice for resale to the government of Iraq); Euro Grain Trading, Ltd. (which bought the rice from Cargill and chartered the RAJAAN); and Brazos River Harbor Navigation District (which provided the RAJAAN with berthing, water and other necessities). The court dismissed for failure to state a claim other third-party defendants impleaded by Dianella.

The court found Hernandez 5% negligent and reduced the recovery to $3,771.208.80. The court held a separate proceeding after trial on Dianella's petition to limit liability to the value of the vessel and pending freight under 46 U.S.C. § 183(a) (1975). The court rejected the petition on grounds that Dianella had not met its burden of proving that it lacked privity or knowledge of the negligent conditions which caused Hernandez's injuries.

Dianella appeals the finding of negligence and disputes the calculation of damages. We affirm the district court's findings on liability however find several portions of the damage award to be in error.

A) *Liability*

The legal duty of a shipowner to an injured worker arises from 33 U.S.C. § 905(b) (1986). It provides:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title . . ."

[1, 2] The Supreme Court clarified the duties imposed on shipowners and stevedores by § 905(b) in *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981). The Court held that under § 905(b):

> "a shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within

> the confines of the cargo operations that are assigned to the stevedore."

Scindia, 101 S. Ct. at 1624. The shipowner is entitled to rely on the stevedore and in general owes no duty to a longshoreman injured in the course of cargo operations. *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.,* 832 F.2d 67, 71 (5th Cir. 1987). However, *Scindia* provides that if the shipowner had actual knowledge of a condition which presented an unreasonable danger to a longshoreman and actual knowledge that he could not rely on the stevedore to correct the condition, then the shipowner, not the stevedore, is liable to the longshoreman. *Scindia,* 101 S. Ct. at 1626. In *Helaire v. Mobil Oil Co.,* 709 F.2d 1031 (5th Cir. 1983) this Circuit held that:

> "[o]nce loading operations have begun, the vessel owner can be held liable for injuries to employees of the stevedore resulting from open and obvious dangers only in the event of actual knowledge of the danger *and* actual knowledge that he cannot rely on the stevedore to remedy the situation."

Helaire, 709 F.2d at 1038-39. If the condition existed from the outset, the shipowner is charged with actual knowledge of the dangerous condition and has a duty to warn the stevedore and the longshoremen if the defect is hidden. *Harris v. Flota Mercante Grancolombiana, S.A.,* 730 F.2d 296, 299 (5th Cir. 1984).

[3] The district court charged Dianella with actual knowledge of an unreasonably dangerous condition based on its finding that the winch had been malfunctioning since the outset of loading. The court relied on testimony

that entries in the ship's log several days before the accident indicated that there was a "leaky winch" in the number one masthouse. No entry on the log indicates that a permanent repair was made. The vessel's second engineer testified that two days prior to the accident, the crew had pumped hydraulic fluid into the winch to purge air from the hydraulic system. The air pressure indicated that the system was leaking.

Next the court held that Dianella had actual knowledge that it could not rely on the stevedore to fix the winch. The stevedore testified that from the outset of loading, the winch would slow down or stop unexpectedly causing pallets holding sacks of rice to swing precariously above the cargo hold. On the day of the accident, each time the winch malfunctioned the stevedore notified the ship's crew. The crew halted loading and added hydraulic fluid to the winch. The stevedore would then resume loading. From this the district court concluded that Dianella had actual knowledge that the stevedore would continue to use the winch in its hazardous condition without remedying it and that the ship had a duty to intervene and repair the winch or take it out of service.

We uphold the district court's finding that Dianella was liable under § 905(b). Dianella argues that the stevedore is liable because he did not stop loading and inform Dianella when the winch malfunctioned immediately before Hernandez's accident. However, the record is replete with evidence that the winch had malfunctioned on many occasions prior to the day of injury, had malfunctioned several times on the day of the accident and that the additions of hydraulic fluid by Dianella were clearly not preventing or correcting the malfunctions. From this the district court fairly charged Dianella with

actual knowledge of the malfunctioning winch and with knowledge that the stevedore, who had been relying on Dianella to repair the winch, could not be expected to remedy the danger.

B) *Damages*

Dianella contends that several components of the damage award are excessive. The standards under which we review a damage award for excessiveness are well known. A trial judge's assessment of damages is a finding of fact which we review under the clearly erroneous standard. *Sosa v. M/V LAGO IZABAL,* 736 F.2d 1028, 1035 (5th Cir. 1984), (*citing, Caldarera v. Eastern Airlines, Inc.,* 705 F.2d 778, 783 (5th Cir. 1983)). This court will not overturn a damage award unless the trier of fact abused its discretion. *Bartholomew v. CNG Producing Co.,* 832 F.2d 326, 331 (5th Cir. 1987) (*citing, Hawkes v. Ayers,* 537 F.2d 836, 837 (5th Cir. 1976)). A verdict will be considered excessive only if it is greater than the maximum amount the trier of fact could properly have awarded. *Sosa, supra,* at 1035. An appellate court may not determine excessiveness by comparing verdicts in similar cases, but rather must review each case on its own facts. *Winbourne v. Eastern Airlines, Inc.,* 758 F.2d 1016, 1018 (5th Cir. 1984), *cert. denied,* 474 U.S. 1036, 106 S. Ct. 603, 88 L.Ed.2d 582 (1985); *Sosa, supra,* at 1035.

Having determined that an award is excessive, this court may either order a new trial on damages or may give the plaintiff the option of avoiding a new trial by agreeing to a remittitur of the excessive portion of the award. *Osburn v. Anchor Laboratories, Inc.,* 825 F.2d 908, 919 (5th Cir. 1987) (*citing, De Centeno v. Gulf*

Fleet Crews, Inc., 798 F.2d 138, 142 (5th Cir. 1986)); *Wells v. Dallas Independent School District*, 793 F.2d 679, 683-84 (5th Cir. 1986). This Circuit follows the maximum recovery rule under which a remittitur may reduce damages only to the maximum amount a trier of fact could properly have awarded. *Osburn, supra,* at 919 (*citing, Zeno v. Great Atlantic & Pacific Tea Co.*, 803 F.2d 178, 181 (5th Cir. 1986)); *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983). Under these criteria, we review each component of the damage award.

i) *Lost Wages*

The trial court calculated the present value of Hernandez's lost future wages using the below-market discount rate. In arriving at the sum of $800,221.00, the court relied exclusively on the calculations of Hernandez's expert. The expert assumed a work-life expectancy of 30 years and used the average full-time United States longshoreman's rate of $23,000.00 per annum. The court adjusted this figure upward to account for seniority and added an additional 15% for fringe benefits. The court adjusted the figures downward to account for inflation, subtracted federal income taxes and multiplied by .85 to arrive at the present value of lost future wages.[2]

The record does not support these findings. Hernnadez's tax returns show that he had been a part-time longshoreman for the three years preceding his injury. His wage rate was $14.00 per hour. In 1980 he earned $8,341.00, in 1981 he earned $8,634.00, in 1982 he earned $6,500.00 and in 1983 (prior to the accident) he earned $2,600.

2. The trial court failed to subtract $56,000 for social security taxes. Hernandez concedes a remittitur in this amount would be due.

No evidence supports the court's conclusion that Hernandez, a part-time worker, would have gained any seniority had he been able to remain on the job. There is no evidence that Hernandez had ever received any fringe benefits.

In *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983) (en banc), *cert. denied sub nom., Heinrich Schmidt Reederei v. Byrd*, 467 U.S. 1252, 104 S. Ct. 3537, 82 L.Ed.2d 842 (1984) (*Culver II*) the Circuit en banc stated that:

> "calculation of the lost income stream begins with the gross earnings of the injured party at the time of the injury. To this amount other income incidental to work, such as fringe benefits, should be added. From it, the fact-finder should subtract amounts the wage earner would have been required to pay such as income tax and work expenses."

Culver II, 722 F.2d at 117.

[4] Based on *Culver II*, the trial court was clearly erroneous in accepting a damage calculation based on the average longshoreman's wage rate. *Culver II* requires the court to use the plaintiff's gross earnings at the time of the injury. The court further erred by adding fringe benefits and seniority in the absence of evidence that Hernandez was entitled to these benefits while he was working part time.

[5] Dianella presented a computation using the below-market discount rate method but substituting Hernandez's actual earnings in the 3.82 years preceding the accident without seniority and fringe benefits. Under these calculations, Hernandez's lost wages would amount to $190,-

296.00.[3] Hernandez has not had the opportunity to challenge the accuracy of Dianella's calculations. We therefore hold that on the issue of lost wages Hernandez may either agree to a remittitur in the amount of $689,925.00, or he may opt for a new trial under the dictates of *Culver II* and this opinion.

ii) *U.S. v. Mexican Rates*

[6] In calculating lost wages and medical expenses, the district court assumed that Hernandez could continue working as a United States longshoreman despite evidence that he was an illegal alien who had been deported on several previous occasions and whose wife and three children resided in Mexico. The court based its assumption on its finding that Hernandez intended to reside permanently in the United States.

The court's assumption that an illegal alien may collect lost wages and medical expenses based on United States rates is called into question by *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S. Ct. 2803, 81 L.Ed.2d 732 (1984). In *Sure-Tan,* the Supreme Court remanded an award of a six-month back pay to several illegal aliens stating that:

> "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

Sure-Tan, 104 S. Ct. at 2814. By similar logic, Dianella argues that Hernandez should be deemed ineligible to

4. Because social security taxes have been subtracted from Dianella's calculation of lost wages, it is not necessary to deduct from this sum the amount of $56,000.00 which Hernandez conceded was in error.

recover lost future United States wages and United States medical expenses because he was not entitled to be present and employed in the United States for the remainder of his life.

Although Dianella's argument may have been correct at the time of Hernandez's injury, the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101 *et seq.* (1987), has placed a belated stamp of legitimacy on the district court's assumption that Hernandez could remain in the United States. Section 1255a(a)(2)(A) of the Act provides that any alien who:

> "establish[es] that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date . . ."

and who meets the other requirements of the Act may be considered an alien lawfully admitted for temporary residence. The record indicates that Hernandez has resided in the United States continuously since 1970 and is therefore likely eligible for resident alien status. We need not ponder the effect of appiying *Sure-Tan's* "legal readmittance into the United States" language to the court's award of lost wages and medical expenses to Hernandez. An illegal alien who has demonstrated his eligibility for permanent resident status under the Immigration Reform and Control Act is entitled to a damage award based on United States wage and medical rates.

iii) *Household Services*

[7] The district court awarded $87,000.00 for lost household services. The court calculated that Hernandez would have performed 10 hours of household services

a week for the remainder of his 72 year life expectancy. However, there was no evidence that Hernandez had performed any household services prior to his injury. Hernandez testified that he lived alone in an apartment at the time of his injury and performed no yard or automobile work. His wife and three children lived in Mexico and his services could not have contributed to their household.

It is indisputable that Hernandez, a paraplegic, has lost his ability to perform household services in the future. However, the trial court is not at liberty to grant damages for lost household services in the absence of *any* evidence that Hernandez performed household services in the past. *See e.g., De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 142 (5th Cir. 1986). In addition, because Hernandez received an award for attendant care, the additional recovery for lost household services would constitute a double recovery. The erroneous allowance of $87,000.00 for lost ability to perform household services is reversed.

iv) *Medical Expenses*

The trial court awarded $153,472.48 in past medical expenses, $152,000.00 for future medical supplies and $582,000.00 in future medical and hospital expenses exclusive of attendant care. Hernandez's expert arrived at these figures by estimating what medical expenses Hernandez had incurred to date as a paraplegic and what expenses he could be expected to incur given his permanent disability.

[8] Dianella challenges the expert's calculation of future medical and hospital expenses on the basis that

he used tax exempt rather than taxable bonds. Dianella contends that the proper figure should have been $451,000.00. However, Dianella presents no legal authority suggesting that the expert's choice of tax exempt bonds was improper. Both types of investment were available and either properly could be used in the calculation. *See, e.g., Culver II, supra,* 722 F.2d at 122. This part of the award is supported by substantial evidence.

[9] Dianella further contends that the court should have calculated medical expenses using Mexican rather than United States rates. Dianella cites *Sosa v. M/V LAGO IZABAL,* 736 F.2d 1028, 1034 (5th Cir. 1984) in which we upheld the use of American medical rate in calculating medical expenses for a Mexican national only after a finding that "[the plaintiff] would not receive adequate medical care in Mexico." *Sosa,* 736 F.2d at 1034. Dianella contends that because the court made no such finding in Hernandez's case, it cannot calculate future medical expenses using American rates. However, *Sosa* does not state that a finding of inadequate foreign medical care must precede every award of medical expenses based on American rates. The decision of which rate to use is a finding of fact which varies from case to case. In this case, Hernandez has been under the care of doctors in Houston and, as discussed in § ii, *supra,* is probably entitled to remain in the United States for his medical care. The court's award of medical expenses based on American rates is therefore not clearly erroneous.

v) *Transportation and Non-Medical Commodities:*

[10, 11] The court awarded $446,400.00 for transportation expense and $18,600.00 for non-medical commodities such as utility bills, cleaning and laundering.

Substantial evidence supports the district court's finding that paraplegics do incur higher utility bills and laundering expenses than non-paraplegics. However, substantial evidence does not support the court's award for transportation expenses. Hernandez testified that he never owned a vehicle before the accident and that since the accident, he only leaves his house to visit friends at a local social hall. He makes this 20-block trip in his wheelchair for exercise. No evidence was presented that Hernandez needed a modified van for medical reasons. This testimony does not support the court's finding that Hernandez required the continuous use of a fully new van plus modifications and operating expenses totaling $446,400.00.

Dianella's expert testified that a large, two-door sedan provided customary transportation for paraplegics at a cost, including upkeep, of $24,248.00. In light of Hernandez's testimony concerning his infrequent use of transportation, this is the largest award supportable by the evidence. Hernandez may accept a remittitur in the amount of $422,151.00 or choose a new trial on the issue of transportation expenses limited to meeting proven needs on a basis of using or renting vehicles of reasonable cost.

vi) *Attendant Care*

[12] The court found that Hernandez would incur $12,547.00 per year in attedant care expenses, at a present value of $730,000.00. The court based its conclusions on Hernandez's expert's testimony that Hernandez would require four hours of assistance by a nurse's aide daily. In the alternative, Hernandez's wife could be compensated on the basis of a nurse's aide's salary for

her assistance in "bathing, housekeeping and meal preparation."

Dianella contends that at most Hernandez requires one or two hours of attendant care daily. In fact, Dianella states that Hernandez would have difficulty being available for four hours of care each day in light of his active rehabilitation schedule. Dianella further states that Hernandez's wife should be compensated on a minimum wage scale, not at the salary of a nurse's aide. Dianella assumes that Hernandez's wife will be available to provide attendant care and that her care will be comparable to that care provided by a nurse's aide. Under its calculations, the maximum amount recoverable for attendant care is $141,534.50.

The evidence supports the district court's rejection of Dianella's assumptions. Hernandez will require skilled attendant care for the rest of his life. The record does not establish that his wife will continue to provide it or will provide it as competently as a nurse's aide. The trial court's award for attendant care is affirmed.

vii) *Pain and Suffering*

[13] The trial court awarded $1,000,000.000 for pain and suffering. Dianella disputes this finding on the basis that Hernandez was instantly paralyzed from the waist down and could not have felt any substantial pain as a result of the injury. Dianella contends that mental anguish does not justify the award in light of testimony by Hernandez's treating physician that he had adjusted well to the disability.

In *Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 632 (5th Cir. 1983), we stated that:

> "any amount awarded for pain and suffering depends to a great extent on the trial court's observation of the plaintiff and its subjective determination of the amount needed to achieve full compensation."

Hyde, 697 F.2d at 632. Each award for pain and suffering depends heavily on its own facts. *Allen v. Seacoast Products,* 623 F.2d 355, 364 (5th Cir. 1980).

The trial court based its award for pain and suffering on testimony that Hernandez suffered "phantom pains" in his legs, underwent several painful surgical procedures and would probably require more surgery in the future. He has experienced a catastrophic change in his lifestyle which has caused a significant degree of mental anguish. In light of this testimony, $1,000,000.00 is not a clearly excessive award beyond the "maximum possible recovery for these injuries." *Sosa, supra,* 736 F.2d at 1035. This award is affirmed.

viii) *Pre and Post Judgment Interest:*

The district court awarded prejudgment interest on the full damage award at a rate of 9% per annum accruing from the date of the injury to the date of the judgment. The court awarded postjudgment interest at a rate of 8.18% per annum.

[14] The award of prejudgment interest in admiralty cases is within the discretion of the trial court. *Curry v. Fluor Drilling Services, Inc.,* 715 F.2d 893, 896 (5th Cir. 1983) (*citing, Harrison v. Flota Mercante Grancolombiana, S.A.,* 577 F.2d 968, 988 (5th Cir. 1978)). In cases arising under 33 U.S.C. § 905(b), prejudgment interest is the rule, not the exception. *Webster v. M/V MOOLCHAND, Sethia Liners Ltd.,* 730 F.2d 1035,

1040 (5th Cir. 1984) (*citing, Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1042 (5th Cir. 1983)).

[15] However, the trial court erred in awarding prejudgment interest with respect to future damages. *Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209, 212 (5th Cir. 1986); *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 956 n. 4 (5th Cir. 1984). At oral argument Hernandez conceded that a remittitur of prejudgment interest on future damages was due. We affirm the award of prejudgment interest on past damages and the award of post-judgment interest, but direct the district court to recalculate the amount of interest awarded on future damages and vacate its prejudgment interest award.

ix) *Credit for Settlement:*

[16] The third-party defendants settled with Hernandez before trial for $410,000.00 and then participated in the trial to establish Dianella's negligence. Dianella concedes that under *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1251 (5th Cir. 1979) it is not automatically entitled to a credit for the settlement. It argues, however, that the amount of the settlement must be deducted from the total damages awarded for Hernandez's injury. Dianella's arguments have merit.

In a recent decision, the Eleventh Circuit held that a plaintiff in a maritime suit is entitled to receive a full damage award less any amount he recovered in a settlement with third-party defendants. *Self v. Great Lakes Dredge & Dry Dock Company*, 832 F.2d 1540, 1548 (11th Cir. 1987). We find the Eleventh Circuit's reasoning in *Self* sound. Hernandez is only entitled to one recovery for the injuries he suffered. *Strachan Shipping*

Co. v. Nash, 782 F.2d 513, 520 (5th Cir. 1986). Because the court's award against Dianella represented 100% of the loss Hernandez suffered (less 5% for contributory negligence) his award from Dianella must be reduced by any amount he received in a settlement from the third-party defendants.

C) *Limitation of Liability*

At a separate hearing after the verdict was rendered, the district court denied Dianella's petition to limit its liability to the value of the vessel plus pending freight, pursuant to 46 U.S.C. § 183(a) (1958).[4] Section 183(a) provides that:

> "The liability of the owner of any vessel . . . for any loss, damage, or injury . . . done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

[17-19] "Privity" as used in the statute means some fault or neglect in which the shipowner personally participates. "Knowledge" means personal cognizance or means of knowledge of which the shipowner is bound to avail himself. *Matter of Texaco, Inc.,* 570 F.Supp. 1272, 1278 (E.D. La. 1983). The burden of establishing 'lack of privity or knowledge' is on the shipowner. *Farrell Lines, Inc. v. Jones,* 530 F.2d 7, 10 (5th Cir.

4. The value of the vessel plus pending freight was $2,820,917.39. We recognize that the adjustments in damages awarded could render this issue moot. However, since the case must go back for further consideration by the district court, it is in the interest of justice to rule on the issue now in the event it recurs.

1976). The court denied the defense holding that Dianella did not meet its burden of establishing lack of privity or knowledge about the malfunctioning winch.

[20] Dianella's managing agent and port engineer testified that they did not have privity or knowledge of negligent acts or unseaworthy conditions. However, this testimony does not establish that the RAJAAN's owner lacked privity or knowledge of the unseaworthy conditions nor does it establish who exercised control over the RAJAAN. In light of this failure of proof by Dianella and the fact that proof of privity or knowledge of the RAJAAN's owners was solely within Dianella's control, we affirm the findings of the district court.

The costs of this appeal will be equally divided between the parties.

AFFIRMED in part, subject to possible remittitur, and, in part, VACATED and REMANDED.

APPENDIX C

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, etc., and Dianella Shipping Corporation,
Defendants-Third Party Plaintiff-Appellants,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES,
LTD., Cargill, Inc., et al.,
Third-Party Defendants-Appellees.

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Her Engines, Tackle, etc., in rem, and
Dianella Shipping Corporation,
Defendants-Appellants.

Nos. 85-2608, 87-2044.

United States Court of Appeals,
Fifth Circuit.

June 20, 1988.

Longshoreman brought action against shipowner and vessel to recover for personal injuries caused by falling sack of rice. The United States District Court for the Southern District of Texas, James DeAnda, J., found shipowner and vessel liable, and shipowner appealed. The Court of Appeals, 841 F.2d 582, affirmed in part, vacat-

ed, and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals held that longshoreman, an illegal alien who had been deported on several previous occasions and whose family resided in Mexico, was entitled to damages for future lost wages at United States rates after he was injured while loading vessel, absent showing by vessel owner that longshoreman was about to be deported.

Petition denied.

Kenneth D. Kuykendall, Royston, Rayzor, Vickery & Williams, Houston, Tex., Robert DeLange, Galveston, Tex., for Dianella, etc., and M/V Rajaan, etc.

Edward J. Hennessy, Helm, Pletcher, Hogan, Bowan & Saunders, Earl B. Austin, Baker & Botts, Houston, Tex., for Cargill, Inc.

David G. Matthiesen, Funderburk & Funderburk, Houston, Tex., for Langston Companies, Inc., et al.

Stephen W. Hanks, Timothy H. Pletcher, Houston, Tex., for Alejandro Hernandez.

Louis E. McCarter, Richard L. Lagarde, Houston, Tex., for Ishikawajima Harima Heavy Industries.

Butler & Binion, Walker Beavers, Robert D. Arredondo, Houston, Tex., for Brazos River Harbor Navigation Dist.

Gary H. Miller, Fulbright & Jaworski, Houston, Tex., for Texas Employers' Ins. Ass'n.

John P. Forney, Jr., Houston, Tex., for Ohji Seiki-Kogyo Kabushiki Kaishi.

Robert L. Adams, Houston, Tex., for Synthetic Industries, Inc.

Robert S. MacIntyre, Jr., Houston, Tex., for Euro Grain Trading, Ltd.

Edward J. Hennessy, Randall D. Wilkins, Houston, Tex., for Affiliated Rice Mills.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, BRIGHT* and POLITZ, Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 30, 1988, 5 Cir. 1988, 841 F.2d 582)

PER CURIAM:

In its petition for rehearing, Dianella correctly points out that the legal and factual issues involved in our determination that Hernandez had demonstrated eligibility for permanent resident status under the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101 *et seq.* (1987), were not properly briefed or developed in either this court or the district court. Part B(ii) of this court's opinion of March 30, 1988, 841 F.2d 582, which concluded that Hernandez had demonstrated his eligibility for permanent resident status under the Immigration Reform and Control Act, was improper, and that part of our opinion is hereby withdrawn and the following is substituted:

---

* Circuit Judge of the Eighth Circuit, sitting by designation.

ii) *U. S. or Mexican Rates*

In calculating lost wages and medical expenses, the district court assumed that Hernandez could continue working as a United States longshoreman despite evidence that he was an illegal alien who had been deported on several previous occasions and whose wife and three children resided in Mexico. The court based its assumption on its finding that Hernandez intended to reside permanently in the United States.

The court's assumption that an illegal alien may collect lost wages and medical expenses based on United States rates is challenged by Dianella on the basis of *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S. Ct. 2803, 81 L.Ed.2d 732 (1984). In *Sure-Tan,* the Supreme Court remanded an award of back pay to several illegal aliens, stating that:

> "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

Sure-Tan, 104 S. Ct. at 2814. Dianella argues that Hernandez similarly should be deemed ineligible to recover lost future United States wages and United States medical expenses because he was not entitled to be present and employed in the United States for the remainder of his life.

Hernandez asserts that he was working in the United States at the time of his injury, and the district court found that he intended to continue working in this country on a permanent basis. The record demonstrates that

Hernandez had been in the United States since 1970 for substantial periods of time and had worked as a longshoreman for almost four years preceding the accident. At the time of the accident, Dianella was accepting Hernandez's labors on the M/V RAJAAN without regard to the status of his citizenship. As a private citizen, Dianella's relationship to Hernandez is not the same as the plaintiffs' relationship with their employer in *Sure-Tan,* in which a back-pay remedy applied by the National Labor Relations Board was found to implicate labor policy considerations.

The question here is whether, given Hernandez's status as an illegal alien, the district court's decision to grant damages to Hernandez for future lost wages based upon his employment status at the time of injury and for the lengthy period preceding injury was clearly erroneous. *Sosa v. M/V LAGO IZABAL,* 736 F.2d 1028, 1035 (5th Cir. 1984). We conclude that it was not.

The burden of proof in the calculation of damages was initially on Hernandez who had to establish the damages his injury had caused and was likely to cause in the future. Once Hernandez proved his prior wages in the United States, the burden shifted to Dianella to establish that the use of past wages to calculate future damages was factually improper and, if so, what a proper measure of damages should be. Because Dianella presented no proof that Hernandez was about to be deported or would surely be deported, the court did not err in basing its award on Hernandez's past earnings stream as required by *Culver II.* Dianella is liable to make Hernandez whole for the injury inflicted. It cannot defeat his right to recover by asserting that his award for future lost wages

should be based upon speculation regarding what he might be earning were he in Mexico. Hernandez has now applied for amnesty under the Immigration Reform and Control Act of 1986, but this development is a matter that we need not now consider.

This correction of Part B(ii) of our opinion of March 30, 1988, does not affect our partial affirmance of the district court's use of U. S. wage rates for the calculation of Hernandez's damages.

In all other respects, the petition for rehearing is DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 85-2608 & 87-2044

ALEJANDRO HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Etc., and DIANELLA
SHIPPING CORP.,
Defendants-Third Party Plaintiff-Appellants,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES,
LTD., CARGILL INC., ET AL.,
Third-Party Defendants-Appellees.

ALEJANDRO HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Her Engines, Tackle, Etc., in rem and
DIANELLA SHIPPING CORP.,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 20, 1988, 5 Cir., 198__, ____F.2d____)

(July 21, 1988)

Before CLARK, Chief Judge, POLITZ and BRIGHT,* Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
Chief Judge

---

* Senior Judge from the 8th Circuit Court of Appeals, sitting by designation.

APPENDIX E

TRIAL RECORD VOLUME 5,
pp. 6-12, 25-30, 34-37

[6]

* * *

ALEJANDRO HERNANDEZ, SWORN
DIRECT EXAMINATION

BY MR. HANKS:

Q. Tell me your name, please?
A. Alejandro Rodriguez Hernandez
Q. Mr. Hernandez, how old are you, Mr. Hernandez?
A. I am thirty-four years old.
Q. Give us your date of birth?
A. 6th of June, '52.

[7]

Q. Where were you born?
A. Lalucha, State of Micharcan, Mexico.
Q. How big a town is that?
A. It's a rural community of about 2,000 inhabitants.
Q. During the time you were growing up there, I understand your father worked in the fields, is that right?
A. Yes.
Q. What kind of work did you do while you were in Mexico?
A. In the fields.
Q. How far did you go in school in Mexico, Mr. Hernandez?
A. The third grade.
Q. Are you able to fluently read and write in Spanish?

A. A little bit.

Q. Are you able to speak or read English?

A. No.

Q. When did you first come to the United States?

A. 1970.

Q. Why did you come to the United States from Mexico?

A. To live better, to make a better life for my family.

Q. What kind of jobs have you done since you first come to the United States?

A. I worked in different kinds of jobs.

Q. Were they all jobs of manual labor type jobs?

[8]

A. Yes.

Q. You worked in Chicago for a time at a restaurant?

A. Yes.

Q. You worked in Fort Worth for a period of time building bumpers for cars?

A. Yes.

Q. I understand you worked for a period of time for a contractor pouring cement?

A. Yes.

Q. You have been back to Mexico for brief periods of time since 1970, is that right?

A. Yes, sir.

Q. You just came back to the United States?

A. Yes.

Q. What kind of work did you begin doing in 1979?

A. 1979, a longshoreman.

Q. In Freeport, Texas?

A. Yes.

Q. Did you continue to work or seek work as a longshoreman from 1979 up until the date you got hurt?

A. I didn't understand.

Q. Did you work as a longshoreman in 1980?

A. Yes.

Q. In 1981?

A. Yes.

[9]

Q. 1982 and 1983 did you continue working as a longshoreman, whenever you could work?

A. Yes, sir.

Q. Before your accident, Mr. Hernandez where was it you wanted to continue living?

A. As a longshoreman.

Q. Did you want to continue living in the United States?

A. Yes.

Q. Was that your intention at that time?

A. Yes.

Q. Was it your intention, before you got hurt, Mr. Hernandez, to continue working as a longshoreman for the rest of your life?

A. Yes. (R. Tr. Vol. 5, pp. 6-9)

[10]

* * *

THE COURT: Is this man married?

MR. HANKS: Yes.

THE COURT: How many children does he have?

MR. HANKS: I will ask him that. I will ask him about it.

[11]

THE COURT: Go ahead.

Q. Mr. Hernandez, I want to ask you a little bit about your family. You were married in Mexico?

A. Yes.

Q. How many children did you have?

A. Three girls in Mexico.

Q. Can you tell me their names, Mr. Hernandez?

A. Luce Maria, Veronica and Guadelopa.

Q. What is the name of your wife?

A. Ouita Ohara D'Hernandez.

THE COURT: How old were you when you were married?

THE WITNESS: I got married in 1969.

THE COURT: Were any of your children born in this country?

THE WITNESS: Well, I had some other children with another lady.

THE COURT: How many other children did you have apart from the children you had with your wife?

THE WITNESS: Three.

THE COURT: Are they American citizens?

THE WITNESS: Yes.

THE COURT: How about the children from your wife, were any of the children you had with your wife American citizens?

[12]

THE WITNESS: No.

THE COURT: Go ahead.

Q. Mr. Hernandez, just for the record, what are the names of your children and ages, if you recall exactly of the children that are born in this country that are American citizens?

A. Yes. One girl is twelve years old. One boy is five years old, the other one four. (R. Tr. 5, pp. 10-12)

* * *

[25]

* * *

Q. (By Mr. Kuykendall) Mr. Hernandez, I understand you came to the United States in 1970?

A. That is correct.

Q. You entered the country in Del Rio, is that correct?

A. Yes.

Q. Did you enter the country illegally?

A. Yes.

Q. How is that, how did you get in in 1970?

A. Through the water.

Q. You were apparently working in Fort Worth in 1973 as a laborer?

A. That's correct.

Q. As I understand it you were apprehended by the

[26]

emigration service in 1974 at Fort Worth, is that correct?

A. That's correct.

Q. Was there a hearing in Fort Worth in 1974 before the emigration service?

A. I don't remember.

Q. What I'm asking you, sir, did the emigration service ask you to leave or did the emigration service just ask you to leave and you left?

A. Well, they took me out of here, they took me to Mexico.

Q. They transported you from Fort Worth back to Mexico?

A. Yes.

Q. Before that occurred, was there a hearing in a room with the emigration officers in which you testified or presented your position as to why you should stay in the country?

THE COURT: Doesn't the record show it was a voluntary departure?

MR. KUYKENDALL: That's what I'm trying to find out.

THE COURT: Do you know?

MR. HANKS: No.

THE COURT: Usually on the first go-around it's a voluntary departure, anyway.

[27]

MR. KUYKENDALL: I understand that, but there were others.

Q. There were subsequent occasions?

A. Yes.

THE COURT: How many times have the emigration service put you out of the country?

THE WITNESS: I don't remember exactly how many times.

THE COURT: Various?

THE WITNESS: Yes, many, several.

Q. In 1975, you came back to the United States and you went to California?

A. Yes.

Q. The emigration service apprehended you in California at River Bend, California and sent you back to Mexico, is that correct?

A. Correct.

Q. That proceeding there, were you allowed to leave California and go back to Mexico voluntarily or was there any type of hearing in which you were ordered to go back to Mexico?

A. That's correct. There was a hearing.

Q. There was a hearing and as a result of that hearing were you deported?

A. That's correct.

[28]

THE COURT: Isn't there some documentation to show whether he was deported or not?

MR. KUYKENDALL: Not under this name.

THE COURT: Under any name.

MR. KUYKENDALL: I don't have it.

THE COURT: They give them a hearing and then grant them a voluntary departure, so it doesn't help me —I don't know how relevant it is anyway, but go ahead.

Q. You came back and went to Chicago?

A. Correct.

Q. You were deported from Fort Worth again?

A. Correct.

Q. You came back to the United States and went to Freeport?

A. Correct.

Q. Have you been deported since you've been at Freeport?

A. In 1978 was the last deportation.

Q. Was that while you were in Freeport?

A. In Pearland.

Q. You got married in 1969 to your present wife, is that correct?

A. Correct.

Q. You had three children and all three children were born in Mexico, is that what I understand?

[29]

A. That's correct.

Q. Were you married to Carmen in Freeport?

A. No.

Q. As I understand it you were not living with Carmen at the time of your injury?

A. Correct.

THE COURT: I believe he construed your previous question. You were asking him the site of his marriage. Is that what you meant to ask him? Where the marriage occurred or where the marriage was performed?

MR. KUYKENDALL: In Mexico. He didn't marry Carmen.

THE COURT: You asked him if he was married in Freeport and I don't know whether you're talking about his status or where the marriage took place.

Q. Mr. Hernandez, I may have been confused myself. I apologize. You have only been married one time and that was to your present wife in Mexico, is that right?

A. Correct.

Q. You have had three children all in Mexico by your present wife?

A. Correct.

Q. While you were married to your present wife, you started living with a lady called Carmen in Freeport?

A. Correct.

[30]

Q. You had three children by Carmen?

A. Correct.

Q. But you and Carmen were separated sometime before you got hurt, as I understand it?

A. Correct.

Q. As I understand it, you, Carmen and the three children were not living together before you got hurt?

A. Correct. (R. Tr. Vol. 5, pp. 25-30)

[34]

* * *

Q. Sir, at the time of your injury your wife was living in Mexico, as I understand it?

A. That's correct.

Q. When you were admitted into TIRR, you started having conversations with Mrs. Lewis and the social worker at TIRR with regard to who was going to take care of you after you were released from the hospital, is that correct? Let me ask you a simpler question. When you were in the hospital did you start having conversations with a social worker at TIRR and you and she

had to decide who was going to help take care of you after you were released from TIRR where you were going to go?

A. That's correct.

Q. You informed the social worker you would like your wife in Mexico to take care of you or assist you after you left the hospital?

A. That's correct.

Q. Arrangements were made through the social worker? She obtained a visitor's visa for your wife to come to the United States, right?

A. That is correct.

Q. Dr. Donovan and the social worker wrote letters on

[35]

your behalf to obtain your wife's admission to come into the country?

A. That's correct.

Q. Was that about May or June of 1984 that she was allowed to come into the United States?

A. In May, no it's not correct. She got the visa in January of this year. January it will be one year. On the 22nd of January it had been a year that she got the visa to come to the United States.

Q. January 1985 Dr. Donovan and the social worker wrote a letter and got her visa extended?

A. That's correct.

Q. Also after your wife was here you obtained the help of Dr. Donovan and the social worker to try to obtain permission for your three children to come to the United States, is that correct?

A. They did this but they couldn't bring the children.

Q. Emigration would not give the children the visa?

A. I believe they didn't.

Q. While you were trying to get the children to come to the United States, didn't you tell Dr. Donovan and the social worker that you wanted them to come to be here until you had completed your rehabilitation and were able to return to Mexico?

A. I don't remember.

[36]

Q. Is the letter, Plaintiff's Exhibit No. 26 written by TIRR, Dr. Donovan and the social worker dated May 10, 1984. On the last sentence the letter says we greatly appreciate your atention in this situation and hope you are able to help Mr. and Mrs. Hernandez's children to come and stay with them until his rehabilitation is finished and he returns to his home in Mexico. Sir, do you remember telling Dr. Donovan and the social worker that you intended to return to Mexico after your rehabilitation was completed?

A. No. I don't remember.

Q. You don't remember, all right. Did you have any intention in May of 1984 to return to Mexico after your rehabilitation?

A. I don't remember.

THE COURT: Do you now have an intention to return to Mexico or do you plan to remain in this country, if you can?

THE WITNESS: If it is possible, I would like to stay here in the United States.

Q. Does your wife and mother intend to stay here, or do you know?

A. I haven't asked them. Only my wife would be trying to stay here.

Q. Is your wife necessary to help you for your

[37]

assistance at home?

A. That's correct.

Q. If she is required to return to Mexico when her visitor's visa runs out, will you go to Mexico with her?

A. No, sir.

Q. Mr. Hernandez, do you know a Nancy Lewis?

A. Nancy Lewis—I don't. The one I know is called Susy Lewis.

Q. The case manager that helped you and got the supplies for you after you checked out of the hospital?

A. Yes.

Q. Do you remember telling Ms. Lewis in June of 1984 you would probably return to Mexico after this case was over?

A. I don't remember.

Q. Do you remember telling anyone that you intended to return to Mexico after this case was over?

A. I don't remember.

Q. Have you made any application with the immigration service to stay in the United States or taken any other action to try to stay in the United States?

A. No. I haven't done anything until this time. I haven't applied for any permits.

MR. KUYKENDALL: No further questions. (R. Tr. Vol. 5, pp. 34-37)

APPENDIX F

TIRR
THE INSTITUTE FOR REHABILITATION AND RESEARCH
in the Texas Medical Center
1333 Moursund Avenue
Houston, Texas 77030
(713) 797-1440

May 10, 1984

To Whom It May Concern:

This verifies that Alejandro Rodriquez Hernandez is a patient undergoing comprehensive rehabilitation in this hospital for a spinal cord injury which left him paralyzed from the chest down. The injury is the result of a work related accident which occurred on 9/21/83.

Comprehensive rehabilitation for a patient like Mr. Hernandez means bringing him to maximum independence at a wheelchair level, including physical, emotional and social independence. This requires at least two years of treatment both in the hospital setting and at home. During Mr. Hernandez first TIRR admission he learned some basic concepts of rehabilitation about his body functions which, if he were not appropriately oriented, could result in complications which might be fatal. He learned to apply these concepts during a two-month discharge and is now readmitted for training in more advanced skills in physical functioning.

Mr. Hernandez's wife, Jovita, was allowed to come into this country several months ago to learn his care and to provide assistance when necessary. However, their three children, Luz Maria - 9, Veronica - 8, and Guadalupe - 7, were left in Mexico in the care of Mr. Hernandez's parents. This separation has caused them anguish and depression, especially Mr. Hernandez, since he is aware that returning to Mexico is not an option for him at this time as treatment is not available where he lives.

Seeing his children again would be very supportive to him and to the Children.

Since Mr. Hernandez's accident occurred while he was at work, his medical expenses are covered and he receives weekly compensation checks from his Worker's Compensation insurance.

We greatly appreciate your attention in this situation and hope you are able to help Mr. and Mrs. Hernandez's children to come and stay with them until his rehabilitation is finished and he returns to his home in Mexico.

/s/ CARMEN G. PENA
Carmen G. Pena, C.S.W.
Medical Social Worker

/s/ W. H. DONOVAN, M.D.
William H. Donovan, M.D.
Attending Physician

Supreme Court, U.S.
FILED
NOV 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DIANELLA SHIPPING CORPORATION,
IN PERSONAM, and M/V RAJAAN,
Her Engines, Tackle, Apparel, Etc.,
IN REM,

Petitioners,

v.

ALEJANDRO HERNANDEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephen W. Hanks
Counsel of Record
Timothy H. Pletcher
HELM, PLETCHER, HOGAN, BOWEN
& SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas 77019-2120
(713) 522-4550

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent Hernandez, being dissatisfied with the presentation of Petitioner, submits the following:

Dianella's Petition presents nothing for review:

I. Respondent's present or future immigration status has no bearing upon the damages Respondent is entitled to recover.

II. Neither the Court of Appeals nor the district court made any determination regarding Respondent's right to remain in the United States. Therefore, there is no conflict with the executive branch of government.

PARTIES INVOLVED

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Respondent certifies that the following is a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed:

1. Alejandro Hernandez
2. Dianella Shipping Corporation
3. Ishikawajima Harima Heavy Industries, Ltd.
4. O.J.I. Seke-Kogyo Kabushinki Kaisha
5. Cargill Inc.
6. Brazos River Harbor Navigation District
7. Affiliated Rice Mills
8. Trans Ocean America, Inc.
9. Langston Companies, Inc.
10. Amoco Fabrics Company
11. Patchogue Plymouth Division
12. Euro Grain Trading, Ltd.
13. General Produce and Fibres, Ltd.
14. West Texas Rice Company
15. Synthetic Industries Texas, Inc.
16. Texas Employers' Insurance Association
17. The West of England Ship Owners Insurance Services Limited.
18. American International Underwriters

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-641

DIANELLA SHIPPING CORPORATION,
IN PERSONAM, and M/V RAJAAN,
Her Engines, Tackle, Apparel, Etc.,
IN REM,

Petitioners,

v.

ALEJANDRO HERNANDEZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent requests this Court to deny the Petition for Writ of Certiorari filed herein by Petitioner.

OPINION BELOW

The Findings of Fact and Conclusions of Law, the original opinion of the Court of Appeals for the Fifth Circuit and the per curiam opinion of the Court of

Appeals for the Fifth Circuit on Motion for Rehearing are reproduced in Petitioner's Appendices A, B and C, respectively.

JURISDICTION

Jurisdictional requirements are adequately set forth in the Petition, page 2.

FEDERAL STATUTES INVOLVED

Respondent believes that the only federal statute involved is the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C.A. §905(b) (West 1986), pertinent parts of which are set forth in the Petition, page 3.

COUNTERSTATEMENT OF THE CASE

The facts material to the question presented appear in the original Opinion of the Court of Appeals for the Fifth Circuit, 841 F.2d 582 (5th Cir. 1988), reproduced in Appendix B of the Petition and the Findings of Fact of the District Court, dated August 5, 1985, unreported, which is reproduced in Appendix A of the Petition.

Petitioner's Statement of the Case omitted the statement of the Court of Appeals regarding the burden of proof as it relates to damage awards for lost earning capacity.

In its per curiam opinion on Petition for Rehearing, the Court of Appeals held that the burden of proof in the calculation of the damages was initially on Hernandez. Such burden required him to establish the damages his injury had caused and was likely to cause in the future. The Court went on to state that only then, when Hernandez had proved his prior wages in

the United States, did the burden shift to Dianella to establish that the use of past wages to calculate future damages was factually improper and, if so, what a proper measure of damages should be. Dianella failed to bring forward such proof and therefore is liable to make Hernandez whole for the injury inflicted.

SUMMARY OF THE ARGUMENT

I. Petitioner's reliance on and application of *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) is misguided. A proper analysis of *Sure-Tan, Inc. v. NLRB* indicates that Respondent's present or future immigration status has no bearing upon the damages Respondent is entitled to recover.

II. Neither the opinion of the Court of Appeals nor the district court established the authority of the district court to determine an illegal alien's right to remain in the United States. The opinion of the district court, affirmed by the Court of Appeals, simply establishes the proper damage award for Respondent's loss of earning capacity, irrespective of his immigration status.

ARGUMENT

I.

Petitioner attempts to use *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), to support the proposition that an illegal alien could not receive lost wages absent a showing that the alien was lawfully available to work. However, Petitioner's use and application of this case is incorrect. Factually, *Sure-Tan* involved an employer's decision to terminate and report to the INS some

illegal alien employees after they attempted to unionize. This prompted action by the NLRB, which fashioned a remedy for the employees which included an order that the employees be reinstated with back pay. On appeal of that order, the Court held that recovery of back pay and reinstatement to employment was contingent upon an alien showing that he could lawfully return to and work in the United States.

The rationale behind the Court's holding was as follows. The Court was concerned with an administrative agency *fashioning* a remedy that directly conflicted with other Congressional mandates. In *Sure-Tan*, the NLRB fashioned a remedy that was directly in conflict with the immigration laws of this country. The remedy would effectively sanction violations of those laws. Congressional and judicial objectives including controlling immigration into this country prohibited the fashioning of such a remedy. The Court also wanted the avoid giving an alien employee favorable economic bias over American workers, albeit under the threat of deportation. Requiring legal documentation to regain terminated employment and recoup back pay satisfies the Court's rationale because it: (1) removes the direct conflict created by the administrative order which, to be enforced, *requires* a violation of Congressional and judicial policy; and, (2) precludes aliens from receiving favorable economic advantages over Americans and removes economic enticements that may lead to illegal immigration. Though the *Sure-Tan* rationale was correct for its particular facts, it is inapplicable to the case before this Court.

Respondent, an illegal alien, was injured by the negligence of a Pakistani vessel while working in the United States, and sought redress. No administrative agency was required to fashion a remedy for Respondent. Congress specifically established his remedy in 33 U.S.C.A. 905(b), a remedy that is in no way in conflict with Congressional mandates or objectives. Devoid from this case are the concerns of economic bias and immigration control that were present in *Sure-Tan*.

A crucial distinction between this case and *Sure-Tan* is that Respondent's quadriplegic state prevents him from working, meaning that he will never benefit from a favorable economic bias over American workers, nor will other workers be enticed to immigrate illegally into this country as a result of the remedy established by Congress. Allowing an undocumented worker to recover damages for work related injuries sustained while actually working in this country does not violate the judicial or Congressional objectives involved in *Sure-Tan*. Thus, Petitioner's argument that Respondent must obtain temporary or permanent resident status is inapplicable to the current case and must be disregarded.

A. The potential that Respondent would ultimately become an illegal employee is irrelevant.

Respondent's injury occurred on September 23, 1983, which meant that the Respondent's employer had legally employed him. Petitioner argues that the 1986 passage of 8 U.S.C. §1324a(f) requires Respondent to qualify for temporary residence status to recover future wages. This section simply imposes criminal liability upon employers of illegal aliens, and in no way pertains to Respondent. Petitioner's ar-

gument is irrelevant because the above analysis under *Sure-Tan* shows that Respondent did not need to qualify to recover these damages, and the employer's potential criminal liability in no way impacts Respondent's ability to recover his damages. It strains credibility to believe that a crime (hiring illegal aliens), which is impossible to commit (Respondent could not work when this Amendment was included), would be dispositive to determine whether Respondent could recover damages to which the courts determined he was rightly entitled.

The Court of Appeals, in its per curiam opinion on Motion for Rehearing, correctly pointed out that "the record demonstrates that Hernandez had been in the United States since 1970 for substantial periods of time and had worked as a longshoreman for almost four years preceding the accident. At the time of the accident, Dianella was accepting Hernandez' labors on the M/V Rajaan without regard to the status of his citizenship. As a private citizen, Dianella's relationship to Hernandez is not the same as the plaintiffs' relationship with their employer in *Sure-Tan*, in which a back pay remedy applied by the National Labor Relations Board was found to implicate labor policy considerations." (Appendix C, page 46a) The Court's decision to grant damages for future lost wages based upon Respondent's employment status at the time of the injury and for the lengthy period preceding his injury was not clearly erroneous. The Court of Appeals so held and went on to state that Dianella "cannot defeat [Hernandez'] right to recover by asserting that his award for future lost wages should be based upon speculation regarding what he might

be earning were he in Mexico." (Appendix C, page 46-47a)

Respondent's immigration status at the time of his injury is simply irrelevant. The only relevant considerations are those considerations that the Court should consider under *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983), known as *Culver II*, in determining an injured person's lost earning capacity.

II.

Petitioner, in its second argument before this Court, asserts that the opinion of the Court of Appeal erroneously establishes the authority of the district court to determine an illegal alien's right to remain in the United States. Even a cursory reading of the Court of Appeal's opinion in this case indicates that is simply not the fact. The Court of Appeals and the district court have simply established what Respondent's damages for lost wages should be, in light of the evidence presented at the trial court level. Neither the Court of Appeals nor the district court made any determination as to whether or not Respondent was entitled to remain in the United States. As Petitioner properly points out, this is not the function of the district court or the Court of Appeals, nor should it be. Each court should be free to examine the evidence regarding lost earning capacity and award damages based upon that evidence, consistent with the remedy established by Congress in the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C.A. §905(b) (West 1986).

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Stephen W. Hanks
Counsel of Record
Timothy H. Pletcher
HELM, PLETCHER, HOGAN, BOWEN
& SAUNDERS
2929 Allen Parkway, Suite 2700
Houston, Texas 77019-2120
(713) 522-4550

Attorneys for Respondent